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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

REX C. CAUBLE, Individually and  
Doing Business as Cauble Enterprises,  
*Petitioner,*

v.

UNITED STATES OF AMERICA.

**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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## QUESTIONS PRESENTED

1. Did the trial judge amend the indictment in this Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* (RICO) case and direct a verdict of guilt on the "enterprise" element of the RICO charge, in that:

(a) the proof at trial showed that there was a separate, loose-knit enterprise-in-fact engaged in marijuana smuggling, assisted in its unlawful endeavors by at most a few of the constituent entities and assets of the charged enterprise, Cauble Enterprises; and

(b) the trial judge charged in effect that the "enterprise" was Cauble Enterprises, a Texas partnership consisting of dozens of entities and separate assets; and

(c) the amendment of the indictment and direction of verdict of guilty usurped the jury's role and masked a substantial variance between the indictment and the proof?

2. Did the multi-million dollar *in personam* forfeiture—the largest forfeiture in American history—violate due process of law and the plain meaning of RICO by forfeiting assets and entities whose activities had no nexus to any alleged or proven illegal conduct on the part of their owner, Rex C. Cauble?

3. Did the forfeiture order in this case violate due process of law by purporting to cut off, without notice and judicial hearing, the rights of innocent limited partners who under Texas law have an undivided interest in each of the assets of the partnership, Cauble Enterprises, when

(a) the court held it has no discretion or power to modify a forfeiture to protect their interests; and

(b) the court held that the third parties are remitted to an unreviewable administrative proceeding in the Department of Justice?

4. May a court of appeals decline to follow clear precedent from this Court and affirm a conviction for misapplication of bank funds, 18 U.S.C. § 656, based upon repaid loans made with the approval of the bank's board of directors and guaranteed by a person with more than ample resources to effect repayment?

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Doing Business as Cauble Enterprises,  
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v.

UNITED STATES OF AMERICA.

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**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
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Rex C. Cauble, individually and doing business as Cauble Enterprises, a Texas limited partnership, petitions this Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, to review his conviction for violation of the Racketeer Influenced and Corrupt Organizations statute, 18 U.S.C. § 1961 *et seq.* (RICO), the Travel Act, 18 U.S.C. § 1952, and 18 U.S.C. § 656 (misapplication of bank funds), his five year sentence, and the forfeiture order involving several millions of dollars in assets.

**OPINION BELOW**

The court of appeals opinion, reported at 706 F.2d 1322, is Appendix A.

## JURISDICTION

A timely petition for rehearing was denied August 11, 1983. Appendix D. This Court has jurisdiction under 28 U.S.C. § 1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

We rely throughout this petition upon the due process clause of the fifth amendment. We maintain that the forfeiture order violates 18 U.S.C. § 3563 and the cruel and unusual punishment clause of the eighth amendment. We further contend that the provisions of RICO for determining criminal liability and penalties, 18 U.S.C. §§ 1962, 1963, were misapplied. The text of each of these provisions is reprinted as Appendix E.

## STATEMENT OF THE CASE

Rex C. Cauble is a 70-year old Texas businessman with no previous criminal record. He is one of the founders and is the general partner of Cauble Enterprises, a Texas limited partnership in which he holds approximately 31%; his wife and son are the limited partners.

The government's chief appellate attorney has written that this case involves "what is probably the biggest forfeiture in American history" and that the court of appeals' opinion is "an encyclopedia of RICO law."<sup>1</sup> We seek certiorari because this forfeiture poses a serious threat to the due process values reflected in 18 U.S.C. § 3563 and misconceives RICO; further, the "encyclopedia" is seriously flawed.

The government amply proved that tons of marijuana were smuggled into the United States aboard four fishing

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<sup>1</sup> U.S. Department of Justice, Narcotics Newsletter, vol. V, no. 5, June, 1983, p. 11.

vessels, with the participation of Cauble's ranch foreman Charles "Muscles" Foster and two former employees of Cauble Enterprises' many businesses and entities. This marijuana smuggling activity had been the subject of earlier cases, in which the government's theory had been that others than Cauble played a directing role.<sup>2</sup> Foster was acquitted in one of these earlier cases by reason of insanity. There is no question that Cauble and banks in which he was a principal stockholder loaned Foster money during this period, nor that the loans were repaid. There is no question that Foster and others used ranches owned by Cauble Enterprises to store, weigh and repack-age marijuana shipments trucked from the coastal off-loading sites. Alleged conspirators stayed in an apartment owned by Cutter Bill, a Western clothing chain owned by Cauble Enterprises. The alleged conspirators also used an airplane owned by Cauble Enterprises, paying for such use on each occasion.

The leading figures in the smuggling operation portrayed themselves, according to Cauble and other defense witnesses, as young, wealthy individuals interested in ranching and cattle purchases. Indeed, one of them, Hawkins, did buy ranchland from Cauble Enterprises, and there was evidence from which cattle sales to these individuals could be inferred. Cauble maintained that he had no knowledge of the smuggling activities, and there was evidence that he had not visited most of these ranch properties for some years; other witnesses, including participants in the importation scheme, testified that the smugglers actively sought to keep Cauble unaware of their illegal activities.

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<sup>2</sup> See *United States v. Ruppel*, 666 F.2d 261 (5th Cir.), cert. denied, 102 S.Ct. 3487 (1982); *United States v. Hamm*, 659 F.2d 624 (5th Cir. 1981) (en banc); *United States v. Hawkins*, 658 F.2d 279 (5th Cir. 1981).



The government also presented evidence of cash deposits to Cauble Enterprises' accounts, claiming that the size and timing of these deposits was consistent with Cauble's knowledge and with investment of the proceeds of illegality. Cauble testified that these deposits represented cash cattle sales and gambling winnings, which was corroborated by notations on the deposit slips. 706 F.2d at 1339 n.55; 23a n.55.

The court of appeals concluded, based upon a review of the record, that the mostly-circumstantial evidence of Cauble's activities would justify a reasonable jury in rejecting his defense of lack of knowledge. To be sure, the witnesses whose testimony would have supported the government's theory were drawn from the ranks of the already-convicted, and were subject to substantial impeachment. But those questions of credibility, the court of appeals concluded, were for the jury.

The jury convicted Cauble of conspiracy to violate RICO, 18 U.S.C. § 1962(d); investment of proceeds of unlawful activity, 18 U.S.C. § 1962(a); and conduct of an enterprise through a pattern of racketeering activity, 18 U.S.C. § 1962(c). The predicate offenses for each of these counts were six alleged violations of 18 U.S.C. § 1952, the Travel Act, and six alleged violations of 21 U.S.C. § 952, marijuana smuggling. Each smuggling predicate was mirrored in one of the Travel Act predicates. (There was an additional Travel Act predicate in each RICO count as well.)

The indictment also charged, and the jury convicted on, other Travel Act counts not made RICO predicates. Finally, Cauble was convicted of misapplication of bank funds, 18 U.S.C. § 656, on the basis of four repaid loans made to Foster by banks in which Cauble had an interest.



The indictment contained a "Notice of Holdings Subject to Forfeiture." This list, attached as Appendix B, purported to incorporate by reference the Articles of Limited Partnership of Cauble Enterprises, but in fact the Articles were never made part of the trial record. The list includes a number of ranches, Cutter Bill Western Wear, a steel company, a trailer company, and Cauble's personal controlling interest in three banks which Cauble Enterprises, as a Texas limited partnership, could not own under Texas law. *See* 61a n.6. An analysis of these assets, complete with record references, is attached as Appendix C.

The court of appeals' opinion contains its detailed analysis of the record. Our petition focuses upon that court's characterization of what was done in the trial court, and upon its refusal to limit the reach of RICO to assets found culpably related to the conduct of the unlawful activity. We note, as Appendix F makes clear, that the marijuana smuggling activities of the principals in the scheme antedated Cauble's alleged involvement. They had already imported and distributed at least one large load before they had any significant contact with him; this much is conceded, at least implicitly, by the government not charging him with any crime in connection with that importation.

Second, we focus upon the RICO element of "enterprise," and the requirement of a "nexus" between the enterprise and the defendant's conduct. This aspect of RICO is vital not only to considering the sentence of imprisonment imposed on the RICO counts, but also to review of whether the forfeiture ordered is out of all proportion to alleged guilt, in violation of constitutional strictures and RICO's plain language.

The government alleged that Cauble Enterprises was the RICO enterprise. Its proof at trial showed that a loose-knit enterprise-in-fact was engaged in marijuana smuggling and began at some point to use some of Cauble Enterprises' assets and entities in furtherance of its activities. This variance presented at least a jury issue as to whether Cauble was guilty of the conduct the indictment charged.

The district judge's charge on the enterprise and "nexus"—in statutory terms, "conduct . . . through," 18 U.S.C. § 1962(c)—was barren of explanatory content. The court of appeals sustained his simply telling the jury that "the enterprise charged in this case in [the RICO counts] . . . is Cauble Enterprises," and giving the jury no clear statement that might have permitted it to decide otherwise.

Following the jury's verdict of guilty, the court then submitted a forfeiture inquiry. The jury was asked (a) whether Cauble maintained his interest in Cauble Enterprises in violation of 18 U.S.C. § 1962, (b) whether his interest afforded a source of control over the enterprise, and (c) whether the entirety of that interest would be forfeited. The jury responded affirmatively to each question. 706 F.2d at 1346 n.90; 38a n.90.

The record is barren of a complete and authoritative listing of Cauble Enterprises' many assets—ranches, separate business corporations, shares of stock, buildings, and so forth. The jury was not asked to determine the forfeiture question on an individual asset basis.

The court of appeals, declining to find and observe limits on RICO's forfeiture provisions that might have resulted from studying the opinions of other circuits, upheld the trial court's action and the jury's verdict.

The result was that Cauble has been ordered to forfeit not only his position as general partner, but all of his interest in every one of Cauble Enterprises' assets. Given the fact, undisputed on this record, that Cauble, his wife and son elected many years ago to place almost all of their assets in the partnership form, Cauble has effectively been stripped of his entire estate.<sup>3</sup>

The forfeiture order may also adversely affect the interests of the limited partners, who have never had notice or judicial hearing. The court of appeals waived away such objections, relying upon its decision in *United States v. L'Hoste*, 609 F.2d 796 (5th Cir.), *reh. den.*, 615 F.2d 383, *cert. denied*, 449 U.S. 833 (1980), remitting the limited partners to their administrative remedy in the Department of Justice, 28 C.F.R. §§ 9.1-9.7 (1982).

#### REASONS FOR GRANTING THE WRIT

The manner in which this case was pleaded, proved and charged to the jury raises compelling constitutional and important statutory issues. We first analyze the "enterprise" element of the RICO offenses in light of the teachings in *United States v. Turkette*, 452 U.S. 576 (1981) and then address the massive, *in personam* forfeiture.

The issues are interrelated, bound by a common concern with the "enterprise" and "conduct . . . through" elements of a RICO offense. The latter element we, consistent with the court of appeals' usage, have termed the "nexus" requirement.

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<sup>3</sup> The court of appeals relied extensively upon Cauble's trial counsel's failure to raise objections to jury instructions. Appellate counsel, also counsel in this Court, has claimed plain error as to some questions of alleged error, and submits that the issues here tendered are sufficiently preserved on this record. Of course, direction of a verdict of guilty, and juridical amendment of the indictment, are always plain error.

**I. THE DISTRICT COURT AMENDED THE INDICTMENT AND DIRECTED A VERDICT OF GUILT ON THE ENTERPRISE ELEMENT. THE COURT OF APPEALS' OPINION UPHOLDS THIS PROCEDURE**

*Turkette* holds: "The existence of an enterprise at all times remains a separate element which must be proved by the Government." 452 U.S. at 583 [footnote omitted.] Consistent with *Russell v. United States*, 369 U.S. 749 (1962), this element of the offense must be pleaded with specificity.<sup>4</sup> *Stirone v. United States*, 361 U.S. 212 (1960) and *Dunn v. United States*, 442 U.S. 100 (1979), confirm that the government may not charge one crime and ride to judgment by proving another. Finally, each element of the offense must be the subject of proper jury instruction so as to avoid a judicial directed verdict. *United Brotherhood of Carpenters & Joiners v. United States*, 330 U.S. 395, 408-09 (1947); *Connecticut v. Johnson*, 103 S.Ct. 969 (1983).

The treatment of the enterprise element in this case violated each of these principles. The indictment charged that "Cauble Enterprises" was the enterprise, yet failed to plead a theory of liability or enumerate the alleged role of each asset listed in the Notice which was attached to the indictment. See Appendix B.

At trial, proof of the enterprise element coalesced with that of the "pattern of racketeering activity" conducted by the "Cowboy Mafia," 706 F.2d at 1329 n.1; 2a n.1, who had been the subject of earlier prosecutions, thus establishing a wholly illegitimate enterprise-in-fact different from the enterprise charged. The trial court's instructions to the jury were critically flawed by failure to instruct "enterprise" as a separate element of the offense

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<sup>4</sup> When forfeiture is sought, the requirements of F.R.Crim.P. 7(c)(2) must also be met.

which had to be proved beyond a reasonable doubt. The trial court simply stated that Cauble Enterprises was charged as the enterprise. This functioned as a directed verdict on the enterprise element, and permitted the government to vary its proof from its pleading. The trial court's action in effect amended the indictment by papering over any issue of whether the government had proved the charges it had made.<sup>5</sup>

The critical mistake of the court of appeals' opinion in scrutinizing the jury instructions was its finding that a directed verdict would only have been accomplished if the trial judge told the jurors "that Cauble enterprises was the RICO enterprise." [Footnote omitted.] 706 F.2d at 1343; 32a. This is not the lesson of *Carpenters & Joiners* and its progeny. A directed verdict is accomplished if the trial court's instructions preclude jury consideration of an element of the offense as was done here.

Since *Turkette* has underscored the critical importance of the enterprise element, the court of appeals' analysis poses serious dangers to the proper administration of RICO. More than harmony to the teaching of *Carpenters & Joiners* and *Dunn* is at stake here, though the principles upon which those cases rest would amply justify issuing the writ: If the government is permitted to play fast and loose with the enterprise element, and then to have its shifting theories ratified by the trial court, the accused, as happened in those cases, is convicted without due process. The enterprise element, once vested with chameleon qualities, changes hue as necessary to permit forfeiture of as many of the the accused's assets—indeed

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<sup>5</sup> The variance/directed verdict point is preserved by timely Rule 29 motions and by the plain error doctrine.

his entire estate, as here—as can be fit into the government's constantly shifting definition.<sup>6</sup>

## II. THE *IN PERSONAM* FORFEITURE IN THIS CASE IS AT WAR WITH THE STATUTE AND VIOLATES DUE PROCESS OF LAW

### A. The Unprecedented Forfeiture In This Case Is Worthy Of Review<sup>7</sup>

Prior to the American Revolution, a well-established common law rule provided that conviction of felony forfeited the defendant's personalty to the Crown and escheated all realty to his lord; the convicted traitor forfeited both to the Crown.<sup>8</sup> In 1787, the framers of the United States Constitution banned imposition of forfeiture of estate and corruption of blood upon conviction of treason,<sup>9</sup>

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<sup>6</sup> The Court's ultimate view of the facts is irrelevant to the proper resolution for the question we present, and to evaluation of its importance. It is either proper to direct a verdict of guilty or it is not; the trial judge either did that or did not. The record fairly presents the "shifting enterprise theory" question on any view of the facts.

<sup>7</sup> The forfeiture issue may be guided to some limited extent by this Court's decision in *United States v. Martino*, 681 F.2d 952 (5th Cir. 1982) (en banc), *rev'd*, 648 F.2d 367 (1981), *cert. granted sub nom. Russello v. United States*, 103 S.Ct. 721 (1983), because if the profits from a pattern of racketeering activity are not forfeitable, then they should not carry with them such a taint that they forfeit defendant's estate when they are placed in the mainstream of his or her legitimate business activities. But, *Martino* was properly pleaded and proved as a wholly illegitimate enterprise-in-fact, and thus is not likely to address the issues raised by forfeiture of assets legitimately acquired preindictment, as here.

<sup>8</sup> 3 W. Holdsworth, *History of English Law* 68-77 (2d Ed. 1927); 1 F. Pollock and F. Maitland, *History of English Law* 351 (2d ed. 1909).

<sup>9</sup> "The Congress shall have power to declare the Punishment of Treason but no Attainder of Treason shall work Corruption of a Blood



and three years later the first Congress abolished forfeiture of estate for all convictions and judgments.<sup>10</sup> The constitutional backdrop has led to the common judicial observation that forfeitures are not favored. See, e.g., *United States v. One 1936 Model Ford V8*, 307 U.S. 219 (1939); *Farmers' & M. Nat. Bank v. Dearing*, 91 U.S. 29 (1875).

Until the enactment of RICO, *in personam* forfeiture was virtually unknown in American jurisprudence. Most forfeiture statutes provide for a proceeding *in rem*, in which if the government prevails, the interests of all claimants are settled. See generally *Colero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). In such proceedings, the claimant almost always has the right to a jury trial, *Vance v. United States*, 676 F.2d 183 (5th Cir. 1982); *United States v. One 1976 Mercedes Benz*, 618 F.2d 453 (7th Cir. 1980). No item of property may be forfeited without proof that it was involved in some unlawful transaction, *King v. United States*, 364 F.2d 235 (5th Cir. 1966) (Tuttle, C.J.). The common law history, as reflected in American constitutional and statutory tradition, is reviewed ably in *United States v. One 1976 Mercedes Benz*, *supra*.

This Court's opinions have generally distinguished the disfavored remedy of *in personam* forfeiture from *in rem* proceedings where "the thing is . . . primarily considered the offender," *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14

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or Forfeiture except during the life of the person attained." U.S. Const. Art. III, Sec. 3, See generally *Wallach v. Van Riswick*, 92 U.S. 202 (1876).

<sup>10</sup> "Provided always, and be it enacted, That no conviction or judgment for any of the offenses aforesaid, shall work corruption of blood, or any forfeiture of estate." Act of April 30, 1790, Sec. 24, 1 Stat. 112 (1790), revised and codified to 18 U.S.C. § 3563 (1976).

(1827), notwithstanding the established innocence of the owner of the *res*. *Harmony v. United States*, 43 U.S. (2 How.) 210 (1844). All the challenges to the historical rationale for *in rem* forfeitures aside, they at least establish the limit of an owner's liability. See O. Holmes, "The Common Law" 27 (1881).

By contrast, "what is innovative about RICO is not that it imposes forfeiture as a consequence of criminal activity, but rather that it imposes it directly on an individual as part of criminal prosecution rather than in a separate proceeding *in rem* against the property." *United States v. Huber*, 603 F.2d 387, 396 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980). See also *United States v. Grande*, 620 F.2d 1026, 1038 n.5 (4th Cir.), *cert. denied*, 449 U.S. 830 (1980), discussing the written views of then-Deputy Attorney General Kleindienst which constitute almost the entire legislative history of the RICO forfeiture provisions. In *Grande*, however, the court followed *Huber* and declined to agree with Mr. Kleindienst that RICO revives common law "forfeiture of estate," or amends 18 U.S.C. § 3563. American law has never disinherited, and RICO ought not now to "disinherit men because they were kindred to felons." 620 F.2d at 1038. The interest sought must, of course, be set out in the indictment, F.R.Crim.P. 7(c)(2), and the proof must sustain the connection of each interest sought to be forfeited to the proven RICO enterprise, which must in turn be the same "enterprise" alleged in the indictment. Nor does the RICO forfeiture reach so far as the *in personam* forfeiture provisions of the "continuing criminal enterprise" statute, 21 U.S.C. § 848(d). See *United States v. Long*, 654 F.2d 911, 915 n.6 (3d Cir. 1981).

Because RICO forfeitures are punitive, and incident to a criminal prosecution, the principle of lenity of course



applies. *Williams v. United States*, 458 U.S. 279 (1982); *Dunn v. United States*, 442 U.S. 100 (1979).

We can in this petition only suggest the depth of constitutional concern raised by a forfeiture of virtually all of petitioner's estate. The court of appeals reached this result by shearing forfeiture of intelligible constitutional limits, and—as we noted above—by permitting the government's definition of enterprise to change at will.

The court first noted that since this is not an *in rem* forfeiture, the proof need not connect any particular item of forfeited property, even if it should consist of thousands of shares of stock in a public company, to culpability in the manner required for forfeiture of a boat, a car, or a rifle.

The court also declined, as noted above, to find error in the district judge's cavalier treatment of the enterprise element of the offense. It then found sufficient the allegations of the Notice of Holdings Subject to Forfeiture. Finally, building upon this series of arguments, the court held that the jury was not required to specify which assets and entities of Cauble Enterprises were subject to forfeiture—all of them were. It reached this result by noting that, after all, the indictment *alleged* that Cauble Enterprises was the "enterprise," forgetting again that allegations and proof can, and in this case at least arguably did, diverge considerably.

Thus was one set of procedural protections against unwarranted forfeiture shorn away by mechanistic invocation of the *in rem/in personam* distinction, and another set shorn away by ignoring salutary limits upon RICO itself and prosecutorial misconduct. Petitioner, through the adventitious choice of a means of conducting his many business activities, lost everything, including

assets acquired long before any alleged connection with wrongdoing and assets having no colorable connection with the charges against him.<sup>11</sup>

There must be some limits here. This is the case to set them. RICO mandates forfeiture, but not a disproportionate one. In *United States v. Huber, supra*, the Second Circuit cautioned against too exuberant an application of RICO forfeiture provisions, and approved a special verdict procedure designed to make sure that entities were not included in the "enterprise" and forfeited merely because the defendant owned them. 603 F.2d at 394-95.

*United States v. Zang*, 703 F.2d 1186 (10th Cir. 1982), suggests that forfeiture reaches only "tainted interests" in an enterprise, and not all its assets.

After all, § 1963(a) does not automatically require forfeiture of all interest in an "enterprise" found to have existed and to have satisfied the RICO criteria. Rather, the defendant must forfeit any "interest" acquired and maintained in violation of § 1962, and any "interest" affording a source of influence over the enterprise. Viewing this language narrowly not only heeds the principle of lenity, *See Williams v. United States, supra*; *Dunn v. United States, supra*, but pretermits consideration of the serious constitutional problems that would attend a forfeiture all out of proportion to a defendant's guilt.<sup>12</sup> The jury, properly charged, might have identified particular

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<sup>11</sup> The court of appeals declared itself and the district court powerless to do anything about this state of affairs, citing its prior opinion in *L'Hoste, supra*. 706 F.2d at 1346-47; 39a.

<sup>12</sup> Given the passage of the Bill of Rights by the same body of lawmakers and citizenry that produced the ant forfeiture statute, 18 U.S.C. § 3563, one may conclude that the forfeiture of a person's

properties that it found to be both part of the enterprise and the basis for the defendant's control.<sup>13</sup> The trial court's fundamentally uninformative charge left the jury with no basis to do anything other than render a blanket forfeiture verdict.

To say that a conviction of crime should entail forfeiture of a person's entire wealth harks back to a common law tradition that fortunately found no welcome on our shores. To say so based on the verdict of a jury that had no guidance and no limits—though they be precious few—on this far-reaching statute is particularly odious and begs review. Rex Cauble has been deprived of his wealth simply because he has it, not because it was accumulated through crime. This Court analyzed the overall purpose of RICO in *Turkette*, and found "[T]he aim is to divest the association of the fruits of its ill-gotten gains." 452 U.S. at 585. Congress must have intended that *in personam* forfeiture under RICO be so limited because it failed to abrogate 18 U.S.C. § 3563.

**B. This Court Should Provide Guidance To Trial Judges As To The Nexus Which Must Be Pleaded And Proved Between The Criminal Enterprise, The Racketeering Activity And Forfeited Assets**

The root of most evils in the court of appeals' opinion is that court's failure to propound and apply a consistent test limiting application of RICO to conduct connected to

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estate is a *per se* violation of the eighth amendment. This Court has recently reaffirmed that a punishment may be unconstitutional if its harshness is disproportionate to the gravity of the offense. *Solem v. Helm*, 103 S.Ct. 3001 (1983).

<sup>13</sup> Of what use are the special verdict provisions of F.R.Crim.P. 32(b)(2) and the forfeiture allegation requirements of F.R.Crim.P. 7(c)(2) if the extent of forfeiture is so predetermined that the jury's function is reduced to that of a rubber stamp?

the enterprise and to the assets sought to be forfeited. The test adopted by the court seems at first reading a modest proposal, but we have seen how, when applied to both the guilt and forfeiture phases of a RICO trial, it palters in a double sense.

Section 1962(a) prohibits the use or investment of income derived from a pattern of racketeering activities in the operation<sup>14</sup> of an enterprise and section 1962(c) prohibits conduct of the affairs of the enterprise "through" a pattern of racketeering activities. The relationship between the income derived from the predicate acts, the defendant's commission of the predicate acts and the conduct of the affairs of the enterprise are critical elements in proving enterprise-based liability.

*Turkette* establishes that the "enterprise" and the "racketeering activity" must be "connected." 452 U.S. at 583. This Court has never fashioned a test to determine if such a relationship exists.<sup>15</sup> The court of appeals formulated the following:

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<sup>14</sup> The charges here were necessarily limited to operation of Cauble Enterprises. Mr. Cauble had acquired his interest in and established Cauble Enterprises long before the alleged pattern of racketeering activities.

<sup>15</sup> Many courts have grappled with this nexus problem and have generally agreed that the government must prove a relationship between the predicate acts, the defendant's conduct, and the affairs of the enterprise. More than mere association or knowledge is required. See *United States v. Phillips*, 664 F.2d 971, 1011-1012 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982) (each predicate act must be related to and intended to further enterprise affairs); *United States v. Nerone*, 563 F.2d 836 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978); *United States v. Dennis*, 458 F. Supp. 197, 199 (E.D. Mo. 1978) (nexus between defendant and enterprise is insufficient if no relationship between alleged activities and conduct of enterprise). There is a dispute, however, in the courts of appeals regarding the

A defendant does not 'conduct' or 'participate in the conduct' of a lawful enterprise's affairs, unless [1] the defendant has in fact committed the racketeering acts as alleged; and [2] the defendant's position in the enterprise facilitated his commission of the racketeering acts, and [3] the predicate acts had some effect on the lawful enterprise.

706 F.2d at 1332-33; 10a.

The court of appeals then found that "the deposit of money into the enterprise's bank account" established sufficient evidence of a direct effect under the third prong of the test. 706 F.2d at 1341 n.62; 10a n.24. The government's proof at trial established little more than cash deposits into one of Cauble Enterprises' many checking accounts. These deposits were not linked to proceeds of any identified illegal importation.

This Court has recognized the dangers in findings of criminal liability on the basis of cash income absent a showing by the government of the unavailability of any legitimate source for such income. See *Holland v. United States*, 348 U.S. 121 (1954).

The court of appeals reliance on the cash deposits strained its nexus test to the breaking point. The existence of cash deposits was the basis for a finding of investment of illegally derived income. This same investment was then used as the basis for a finding of both conduct of the enterprise's affairs "through" a pattern of racketeering activity and nexus between the illegal acts and individual assets to justify forfeiture.

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degree of relatedness that must be shown. See *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1982); *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); Tarlow, *RICO Revisited*, 17 Ga.L.Rev. 291, 371-376 (1983).

Mr. Cauble proved at trial a legitimate source, cattle sales, and a legal, though to some an opprobrious source, gambling, for the bulk of the cash income. The existence of cash deposits over a two-year period in a multimillion dollar business such as Cauble Enterprises cannot support a finding of nexus or derivation from an illegal source.

Turning to the forfeiture issue, neither the indictment nor the proof at trial established any relationship between the diverse assets of Cauble Enterprises and the criminality which underlay the RICO charges.

**III. THIS COURT SHOULD DECIDE WHAT, IF ANY, DISCRETION A DISTRICT COURT JUDGE HAS UNDER 18 U.S.C. § 1963(a) WHEN AN *IN PERSONAM* FORFEITURE ORDER IS FINALLY LEVIED AGAINST PROPERTY IN WHICH THIRD PARTIES HAVE AN UNDIVIDED INTEREST. THE COURTS OF APPEALS ARE IN DISARRAY ON THE ISSUE**

The court of appeals found that the limited partners of Cauble Enterprises had no right to notice or a judicial hearing concerning their undivided vested property interest, a holding thought compelled by *United States v. L'Hoste*, 609 F.2d 796 (5th Cir.), *reh. den.*, 615 F.2d 383, *cert. denied*, 449 U.S. 833 (1980).<sup>16</sup> They had neither the right to participate in the trial proceedings, nor any right to notice or hearing prior to the entry of a forfeiture order

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<sup>16</sup> Beside *L'Hoste*, the court of appeals relied on a student comment, *RICO Forfeitures and the Rights of Innocent Third Parties*, 18 Cal. W.L. Rev. 345 (1982). 706 F.2d at 1346 n.89; 37a n.89. This article not only contains a gross mischaracterization of the *L'Hoste* opinion as holding that Congress implicitly repealed the statutory prohibition of forfeiture of estate in passing the RICO statute, *id.* at 351 and n.84, but is riddled with tendentious remark and speculation. *Id.* at 358.



purporting to remove a general partner and install the government in his place as holder of an undivided interest in all of Cauble Enterprises' assets.

The court of appeals decided that the limited partners need not be provided a judicial forum at any time and are relegated to the filing of an unreviewable petition to the Attorney General of the United States for a remission or mitigation of the forfeiture.<sup>17</sup> It is unlikely that the Attorney General's exercise of discretion is reviewable.<sup>18</sup>

The Department of Justice has recently changed its policy regarding such petitions and now recognizes that third party claimants:

[A]sserting a legal interest in forfeited property that cannot be co-extensive with the order of forfeiture—are entitled to a judicial resolution of their claims, and that it is improper and arguably even unconstitutional for the remission and mitigation process, which has traditionally been viewed as solely a matter of executive discretion, to be used as a forum for resolution of their asserted interests.<sup>19</sup>

The court of appeals approach to 18 U.S.C. § 1963(c) is also contrary to that dictated in *Johnson v. Robison*, 415

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<sup>17</sup> The regulations which define this procedure provide little guidance and no assurance of due process. 28 C.F.R. §§ 9.1-9.7 (1982).

<sup>18</sup> See *United States v. One 1970 Buick Ser. 494870H910774*, 463 F.2d 1168, 1170 (5th Cir.), (on suggestion for hearing *en banc*), cert. denied, 409 U.S. 980 (1972). Cf., *United States v. One Tintoretto Painting*, 691 F.2d 603, 609 (2d Cir. 1982) (failure to exhaust administrative remedies for remission does not deprive *in rem* claimant of standing to file action for return of seized property in federal court.)

<sup>19</sup> Hearings concerning H.R. 3299, The Comprehensive Drug Penalty Act of 1983 Before the Subcommittee on Crime of the House Committee on the Judiciary, 98th Cong., 1st Sess. 16 (1983) (Statement of James I.K. Knapp, Deputy Assistant Attorney General, Criminal Division).

U.S. 361, 373-4 (1974) (statute cannot be construed to restrict access to judicial review in absence of clear and convincing evidence of congressional intent to prevent such review). A claimant should at least be allowed those judicial challenges afforded by, *e.g.*, *Colero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

An exercise of discretion by the Attorney General cannot be a substitute for due process rights. The protections of the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* are not apparent in the skeletal regulations on mitigation and remission. We ask that the procedural fairness of this suggested procedure be examined by this Court in light of the teachings of *Fuentes v. Shevin*, 407 U.S. 67, 80-83 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339-42 (1969); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); and, *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *see also United States v. Spilotro*, 680 F.2d 612, 617 (9th Cir. 1982) (applying *Fuentes* to RICO forfeitures).

Since *L'Hoste* the United States Court of Appeals for the Tenth Circuit has squarely held that a district court has power under 18 U.S.C. § 1963(c) to establish the terms and conditions of forfeiture and to protect the interests of innocent third parties. *United States v. Zang*, 703 F.2d 1186, 1197 (1982). *Accord, Boffa v. United States*, 688 F.2d 919, 939 (3d Cir. 1982), *cert. denied*, 103 S.Ct. 1272 (1983). *See also United States v. Huber, supra.* Thus, the Fifth Circuit stands alone in holding that district court has no discretion under § 1963(c).

Finally, the most compelling reason for review of the forfeiture is this Court's decision in *United States v. Rodgers*, 103 S.Ct. 2132 (1983), decided the same day as this case below. In marked contrast to the judicial deference to nonliable third party interests suggested in *Rod-*



*gers*, the court of appeal here rejected the suggestion that procedural fairness must attach to the process whereby undivided property interests are divided, holding that the suggestion "would make the validity of federal RICO forfeitures subject to the nuances of state property law." 706 F.2d at 1347, 39a. We respectfully submit that the message of *Rodgers* is that the nuances of state property law must be considered by a trial court in the exercise of its equitable discretion upon the entry of a forfeiture order.

#### IV. THE COURT OF APPEALS REJECTED PRECEDENT FROM THIS COURT IN UPHOLDING PETITIONER'S CONVICTION FOR MISAPPLICATION OF BANK FUNDS

Cauble was convicted of four counts of misapplication, 18 U.S.C. § 656, in connection with four loans made to Charles "Muscles" Foster by the Western State Bank and the South Main Bank.

18 U.S.C. § 656 punishes one who "embezzles, abstracts, purloins or willfully misapplies" the funds of a federally-insured bank. *See* 706 F.2d at 1352-56, 50a-58a, for the court of appeals' discussion of this issue.

Embezzlement and purloining—stealing—pose few conceptual difficulties in this context. Misapplication—a type of conversion that may, as here, allegedly occur when the bank does routine transactions such as loaning money, has posed significant problems of interpretation.

Banks are in the business of loaning money. Thus, the boundary between criminal and noncriminal conduct is the same as that between the bank's lawful duty and

misapplication.<sup>20</sup> The banks loaned money to Foster on four occasions. The loans were all paid back. The alleged crime arises because Cauble allegedly induced the bank to make the loans knowing that Foster was a "high risk" borrower.

In this area, this Court has been careful to stress that the distinction between maladministration and misapplication must be carefully preserved, for misapplication has no settled technical meaning. *United States v. Britton*, 107 U.S. 655, 669 (1883). In another opinion respecting the same Mr. Britton, this Court heaped scorn upon the idea that a loan action concurred in by the board of directors of a bank could occasion criminal liability for an officer who was also on the board. *United States v. Britton*, 108 U.S. 193, 197 (1883).

Yet the court of appeals, conceding that *Britton* "may be construed as recognizing a consent defense," affirmed petitioner's conviction under § 656. It did so in full retreat from some of its own prior cases, *e.g.*, *United States v. Mann*, 517 F.2d 259, 268 (5th Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976). See also *United States v. Robinson*, 30 F.2d 25, 27 (6th Cir. 1929).<sup>21</sup>

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<sup>20</sup> The court of appeals also upheld the sufficiency of the indictment, even though it did not allege a transaction amounting to misapplication, nor the name of the borrower whose unreliability was allegedly the crucial issue. Surely this falls afoul of the cases cited in text, as well as of *Russell v. United States*, 369 U.S. 749 (1962).

<sup>21</sup> The court of appeals recognized how crucial intent was to the jury's determination, and said that if trial counsel had asked for an instruction that consent should be considered by the jury, the trial judge should have given it. 709 F.2d at n.137, 57a n.137.

## CONCLUSION

For all of the above reasons, it is respectfully prayed that the writ of certiorari be granted.

Respectfully submitted,

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Dated: October 10, 1983

## **APPENDIX**

## APPENDIX A

UNITED STATES COURT OF APPEALS,  
FIFTH CIRCUIT.  
MAY 31, 1983

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No. 82-2087

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UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*  
v.

REX C. CAUBLE, Individually and  
doing business as Cauble Enterprises,  
*Defendant-Appellant.*

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Defendant was convicted in the United States District Court for the Eastern District of Texas, William M. Steger, J., of substantive violations of Racketeer Influenced and Corrupt Organizations Act, conspiracy to violate RICO, three violations of Travel Act, and four counts of misapplication of bank funds, and he appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) evidence was sufficient to support defendant's convictions under Racketeer Influenced and Corrupt Organizations Act; (2) defendant's general partnership interest in business was subject to forfeiture under RICO; (3) evidence supported defendant's convictions under Travel Act; and (4) evidence supported defendant's convictions for misapplication of bank funds.

**Affirmed.**

Appeal from the United States District Court for the Eastern District of Texas.

**Before WISDOM, RUBIN and TATE, Circuit Judges.**

**ALVIN B. RUBIN, Circuit Judge:**

Rex C. Cauble appeals his conviction on a ten-count indictment charging him with violating the Racketeer Influenced

and Corrupt Organizations statute (RICO) and the Travel Act and with misapplication of bank funds. Cauble, a wealthy Texas businessman, was in effect accused of being the range boss of the highly publicized "Cowboy Mafia," a loosely-knit group responsible for importing and distributing over 147,000 pounds of marijuana from 1976 through 1978.<sup>1</sup> The indictment charged Cauble with substantive violations of RICO<sup>2</sup> based on conduct of an enterprise through a pattern of racketeering activity and investment of income from racketeering activity in

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<sup>1</sup> The "Cowboy Mafia" included a number of Cauble Enterprises' employees and others. Its composition and exploits are chronicled in several of our earlier opinions. See *United States v. Ruppel*, 666 F.2d 261 (5th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 102 S.Ct. 3487, 73 L.Ed.2d 1369 (1982); *United States v. Hamm*, 659 F.2d 624 (5th Cir.1981) (en banc); *United States v. Hawkins*, 658 F.2d 279 (5th Cir.1981).

- <sup>2</sup> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or [sic] racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
- (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
- (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which

an interstate enterprise; conspiracy to violate RICO; three violations of the Travel Act,<sup>3</sup> and four counts of misapplication of bank funds.<sup>4</sup> The jury convicted him on all counts and found that Cauble's share of Cauble Enterprises should be forfeited.

affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1962 (1976).

<sup>3</sup> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

- (1) distribute the proceeds of any unlawful activity; or
- (2) commit any crime of violence to further any unlawful activity; or
- (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act) or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

18 U.S.C. § 1952 (1976).

<sup>4</sup> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal

The trial judge imposed a five-year sentence on Count One and concurrent five-year sentences on the other counts and ordered the forfeiture. Cauble's appeal raises myriad challenges to the indictment, the sufficiency of the evidence adduced at trial, and the legality of the forfeiture. Having reviewed the sixteen-volume record, we conclude that the trial was fair, the evidence was sufficient, and the assertions of error are without merit. We, therefore, affirm the judgment of conviction and forfeiture.

## I. THE RICO CLAIMS

### A. *Background*

Congress adopted the Racketeer Influenced and Corrupt Organizations provisions<sup>5</sup> "to provide a blueprint for federal action against organized crime. . . ."<sup>6</sup> Although it suffered

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Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted [sic] to the custody or care of any such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than \$5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

18 U.S.C. § 656 (1976).

<sup>5</sup> Organized Crime Control Act of 1970, Title IX, Pub.L. No. 91-452, 84 Stat. 922, 941 (codified at 18 U.S.C. §§ 1961-1968 (1976 & Supp. V 1981)).

<sup>6</sup> Note, *Elliott v. United States: Conspiracy Law and the Judicial Pursuit of Organized Crime Through RICO*, 65 Va.L.Rev. 109, 109 (1979).



initially from limited use, RICO is now a frequently-employed arrow in the federal prosecutor's crime-fighting quiver. RICO's application and effectiveness have been enhanced by the judicial consensus that it may be used even though no organized crime activity is charged<sup>7</sup> and by the Supreme Court's decision that it applies not only to legitimate enterprises conducted through a pattern of racketeering activity, but to wholly illegitimate enterprises as well.<sup>8</sup>

### 1. What RICO Prohibits

RICO's purpose is "the imposition of enhanced criminal penalties and new civil sanctions to provide new legal remedies for all types of criminal behavior, that is, enterprise criminality—from simple political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavors."<sup>9</sup> RICO does not, however, criminalize conduct that was legal before its enactment. Its application depends on the existence of racketeering activity violating some other criminal statute, state or federal.<sup>10</sup>

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<sup>7</sup> See Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 Fordham L. Rev. 165, 175 & n. 48 (1980). This article, although generally critical of RICO, states that the courts' conclusion that an organized crime link is not required is persuasively supported by Congress' refusal to incorporate a definition of organized crime into RICO. See also Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts — Criminal and Civil Remedies*, 53 Temp. L. Q. 1009, 1013-14 (1980) (RICO applies to all types of organized criminal behavior); cf. Note, *The Racketeer Influenced and Corrupt Organizations Act: An Analysis of the Confusion in its Application and a Proposal for Reform*, 33 Vand. L. Rev. 441, 441 n. 4 (1980) (organized crime describes "the different groups of individuals who supply illegal goods and services . . . to countless numbers of citizen customers").

<sup>8</sup> *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981).

<sup>9</sup> Blakey & Gettings, *supra* note 7, at 1013-1014.

<sup>10</sup> Thus Blakey and Gettings describe RICO as a "remedial" rather than a "criminal" statute. See *id.* at 1021 n. 71.

Section 1962(a) of the statute prohibits the use of illegally-derived funds to acquire or maintain an interest in an enterprise by legal means.<sup>11</sup> Section 1962(c) proscribes the illegal use of an enterprise. Section 1962(d) makes illegal a conspiracy to violate RICO's substantive provisions, requiring the government to prove that the defendant agreed to participate in the enterprise's affairs through a pattern of racketeering. Each section requires that the enterprise affect interstate commerce.

The government establishes a § 1962(a) violation by proving the existence of an enterprise, the defendant's derivation of income from a pattern of racketeering activity, and the use of any part of that income in acquiring an interest in or operating the enterprise. The government establishes a § 1962(c) violation by proving the existence of an enterprise, the defendant's employment by or association with that enterprise, and the defendant's conduct of or participation in the conduct of the enterprise's affairs through a pattern of racketeering activity.<sup>12</sup> Because this case requires us to examine the proof necessary to demonstrate both the existence of an enterprise and the connection of a defendant to it, we discuss each element briefly.

## 2. Enterprise

The statute states: "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."<sup>13</sup> The Supreme Court has held that this language encompasses both wholly legal entities and

<sup>11</sup> Section 1962(b) forbids the takeover of an enterprise by the use of illegal means. Cauble was not charged under this section.

<sup>12</sup> *United States v. Kopituk*, 690 F.2d 1289 (11th Cir. 1982); *United States v. Phillips*, 664 F.2d 971, 1011 (5th Cir. 1981), *cert. denied*, \_\_\_ U.S. \_\_\_, 103 S.Ct. 208, 74 L.Ed.2d 166 (1982).

<sup>13</sup> 18 U.S.C. § 1961(4) (1976).

completely illegal associations-in-fact.<sup>14</sup> But "[t]he 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages."<sup>15</sup> Therefore, in every case the government must prove not only that there was a pattern of racketeering activity but that it was conducted through an enterprise as thus defined.

In this case the indictment charged that Cauble Enterprises, a legal partnership consisting of Cauble, his wife, and his son, was the enterprise used in violation of both §§ 1962(a) and (c).<sup>16</sup>

### 3. Pattern Of Racketeering Activity

The statute defines a "pattern of racketeering activity" as "at least two acts of racketeering activity . . . the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity."<sup>17</sup> "Racketeering activity" includes an array of crimes that violate either state or federal law.<sup>18</sup>

<sup>14</sup> *Turkette*, 452 U.S. at 592, 101 S.Ct. at 2533, 69 L.Ed.2d at 260.

<sup>15</sup> *Id.* at 583, 101 S.Ct. 2528-29, 69 L.Ed.2d at 255. The court stated that an enterprise is "an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct." *Id.* at 583, 101 S.Ct. at 2528, 69 L.Ed.2d at 254.

<sup>16</sup> In *United States v. Stratton*, 649 F.2d 1066, 1075 (5th Cir.1981), we held that the prosecution need not specify whether the enterprise is a "legal entity" or a "group of individuals associated in fact although not a legal entity" because "there is no logical or statutory reason to force the government to choose between alternative enterprise theories as long as the indictment is otherwise sufficient." (citation omitted). When, however, the indictment makes clear that the government is proceeding on the theory that the enterprise is one or the other of these two kinds of enterprise, it must prove the existence of "the associational enterprise on which [it] rested its case." *United States v. Lemm*, 680 F.2d 1193, 1198 (8th Cir.1982), *cert. denied*, \_\_\_ U.S. \_\_\_, 103 S.Ct. 739, 74 L.Ed.2d 960 (1983).

<sup>17</sup> 18 U.S.C. § 1961(5) (1976).

<sup>18</sup> *Id.* § 1961(1) (Supp. V 1981). The racketeering activity alleged in this case included "dealing in narcotic or other dangerous drugs," *id.*, and Travel Act violations.

#### 4. Nexus Between The Enterprise And The Racketeering Activity

RICO criminalizes the conduct of an enterprise through a pattern of racketeering activity and not merely the defendant's engaging in racketeering activity.<sup>19</sup> Therefore, there must be a nexus between the enterprise, the defendant, and the pattern of racketeering activity. The mere fact that a defendant works for a legitimate enterprise and commits racketeering acts while on the business premises does not establish that the affairs of the enterprise have been conducted "through" a pattern of racketeering activity.<sup>20</sup> Similarly, a defendant's mere association with a lawful enterprise whose affairs are conducted through a pattern of racketeering activity in which he is not personally engaged does not establish his guilt under RICO.<sup>21</sup>

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<sup>19</sup> *Phillips*, 644 F.2d at 1011 (gravamen of RICO offense is conduct of an enterprise through a pattern of racketeering activity); *United States v. Martino*, 648 F.2d 367, 381 (5th Cir. 1981) (RICO proscribes the furthering of the enterprise, not the predicate acts), *cert. denied*, 456 U.S. 949, 102 S.Ct. 2020, 72 L.Ed.2d 474 (1982).

<sup>20</sup> *See, e.g., United States v. Dennis*, 458 F.Supp. 197 (E.D.Mo.1978) (defendant's employment by General Motors Assembly Division and collection of unlawful debts on its premises failed to establish nexus), *aff'd*, 625 F.2d 782 (8th Cir. 1980).

<sup>21</sup> For example, in *United States v. Barber*, 668 F.2d 778 (4th Cir.), *cert denied*, \_\_\_ U.S. \_\_\_, 103 S.Ct. 66, 74 L.Ed.2d 67 (1982), the enterprise charged was the West Virginia Alcoholic Beverage Control Commission. The defendant, a Commission official from 1969 to 1973 and Commissioner from 1973 until 1976, was convicted of manipulating the "withdrawal" and "breakage" rules to obtain free liquor for himself and others. If, however, the proof had shown that subordinate Commission employees manipulated these rules to get liquor without the defendant's knowledge, consent, or participation, he could not have been convicted under RICO. This is because, although the Commissioner would have "conducted" the affairs of a RICO "enterprise," he would not have done so "through" a pattern of racketeering activity.

In several opinions we have discussed the requirement that there be a nexus between the enterprise and the racketeering activity. We have not, however, formulated a test to determine whether the requisite nexus has been established by the government's proof.<sup>22</sup> Even in our most recent discussion of legal enterprises, *United States v. Dozier*, 672 F.2d 531 (5th Cir.), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 103 S.Ct. 256, 74 L.Ed.2d 200 (1982), we did not define the nexus required but concluded that "the nexus is clear" because "[o]nly [the defendant's] position in the [enterprise] and his control over its affairs enabled him to hawk its services for personal gain." 672 F.2d at 544.

Two courts have held that the test for determining whether the government has met the nexus requirement is whether it has proved that "(1) [the defendant] is enabled to commit the predicate offenses solely by virtue of his position in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise."<sup>23</sup> This test appears to us essentially to combine the two required connections under part (1) of the inquiry. Because the enterprise-racketeering nexus should be distinct from the defendant-racketeering connection, we find it necessary to

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<sup>22</sup> We stated in *Martino* that the predicate crimes must be "related to the affairs of the enterprise." 648 F.2d at 403. In *United States v. Welch*, 656 F.2d 1039, 1061 (5th Cir.1981), *cert. denied*, 456 U.S. 915, 102 S.Ct. 1768, 72 L.Ed.2d 173 (1982), we stated that there must be "a relation between the predicate offenses and the affairs of the enterprise." We added: "Congress intended only to require a sufficient nexus between the racketeering activities and the affairs of the enterprise." 656 F.2d 1062. See also *United States v. Hartley*, 678 F.2d 961, 991 (11th Cir.1982) (applying *Martino* formulation; "no difficulty in finding a sufficient nexus between the deceptive activities employed by the defendants . . . and the common everyday affairs of the enterprise . . ."), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 103 S.Ct. 815, 74 L.Ed.2d 1014 (1983).

<sup>23</sup> *United States v. Provenzano*, 688 F.2d 194, 200 (3rd Cir.), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 103 S.Ct. 492, 74 L.Ed.2d 634 (1982); *United States v. Scotto*, 641 F.2d 47, 54 (2d Cir.1980), *cert. denied*, 452 U.S.

modify this formulation. A defendant does not "conduct" or "participate in the conduct" of a lawful enterprise's affairs, unless (1) the defendant has in fact committed the racketeering acts as alleged; (2) the defendant's position in the enterprise facilitated his commission of the racketeering acts, and (3) the predicate acts had some effect on the lawful enterprise.<sup>24</sup>

### B. Challenges To The Indictment

Cauble challenges each RICO count on the ground that it fails to state an offense against the United States.<sup>25</sup> Count One

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961, 101 S.Ct. 3109, 69 L.Ed.2d 971 (1981). The *Scotto* Court held it unnecessary to show that the defendant enhanced or solidified his position in the enterprise through commission of the predicate violations. 641 F.2d at 54. That question is not raised by this case and we need not address it.

<sup>24</sup> The effect may be direct, such as the deposit of money in the enterprise's bank account, or indirect, such as the retention of the enterprise's existing clients. The government need not prove that the racketeering activity "benefitted" or "advanced the affairs of" the enterprise. See *Hartley*, 678 F.2d at 990-91; *Welch*, 656 F.2d at 1062; cf. *United States v. Webster*, 669 F.2d 185, 187 (4th Cir.) (modifying earlier opinion holding that enterprise's affairs must be benefitted), cert. denied, 456 U.S. 935, 102 S.Ct. 1991, 72 L.Ed.2d 455 (1982). Nor must the government demonstrate that the enterprise itself was corrupt or that it authorized the defendant's conduct. The prosecution need prove only that the racketeering acts affected the enterprise in some fashion.

Of course, if the defendant exercised such control over the legal enterprise as to make his acts the acts of the enterprise, proof of the defendant's commission of racketeering acts satisfies both nexuses. In that event the defendant's connection with the racketeering acts is also the enterprise's connection. This is "conduct" of a legal enterprise through a pattern of racketeering activity. Cf. *Martino*, 648 F.2d at 382 ("conducts" simply means performance of activities necessary or helpful to operation of enterprise).

<sup>25</sup> Although this claim was not raised in the district court, we consider it on appeal because a challenge to the indictment's sufficiency may be raised at any time. *United States v. Meacham*, 626 F.2d



of Cauble's indictment, the conspiracy charge, details the predicate offenses and overt acts with great specificity. It alleges that as part of the conspiracy Cauble Enterprises' "lands, buildings, automobiles, aircrafts [sic], employees and assets" would be used. It then lists thirty-seven overt acts, alleging that Cauble and Cauble Enterprises loaned money to, financed travel by, and provided ranches and an airplane for use by the conspirators. Cauble nonetheless contends that this count is defective because its charging portion does not include references to the particular means by which Cauble Enterprises' affairs were conducted through a pattern of racketeering activity. He also contends that the allegation that he acted "individually and doing business as Cauble Enterprises" "leaves a question whether some agency theory more arcane than contemplated by 18 U.S.C. § 2 is being invoked."<sup>26</sup> Finally, he charges that the count is too vague to permit a clear answer.

The indictment's purpose is to inform the accused of the charges; it must be read in the light of that purpose. An

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503 (5th Cir.1980); see Fed.R.Crim.P. 12(b)(2). When the question is not raised below, however, we construe the indictment liberally and will not reverse unless it cannot within reason be construed to charge crime. *United States v. Hart*, 640 F.2d 856, 857-58 (6th Cir.), cert. denied, 451 U.S. 992, 101 S.Ct. 2334, 68 L.Ed.2d 853 (1981).

<sup>26</sup> 18 U.S.C. § 2 (1976) deals with liability of principals. The indictment charges Cauble individually and doing business as Cauble Enterprises. It charges that Cauble Enterprises was a limited partnership in which Rex C. Cauble was general partner. The indictment does not charge Cauble Enterprises with any corrupt or criminal conduct. Hence the designation of Cauble "doing business as Cauble Enterprises" further identifies the individual and particularizes the charge by showing in what guise he engaged in the conspiracy. See *United States v. Zitomer*, 251 F.Supp. 357, 359 (D.Conn.1966) (and cases cited therein). We see neither error nor arcane agency principle in this form of indictment. See *United States v. Cappetto*, 502 F.2d 1351 (7th Cir.1974) (civil injunction), cert. denied, 420 U.S. 925, 95 S.Ct. 1121, 43 L.Ed.2d 395 (1975).



indictment is sufficient if it contains the elements of the offense charged, fairly informs the defendant what charge he must be prepared to meet, and enables the accused to plead acquittal or conviction in bar of future prosecutions for the same offense. *Stratton*, 649 F.2d at 1073.

In *Stratton*, the defendant argued that the indictment was defective because it alleged too broad an enterprise. We stated: "The agreements which were part of the alleged conspiracy, the 'overt acts' in furtherance of the conspiracy, and the substantive racketeering offenses are all related in great detail." *Id.* We, therefore, concluded that the indictment left no room for doubt about the charges lodged against each defendant and protected them from double jeopardy.

Count One of this indictment, whose detail we have already summarized, is sufficient to inform Cauble of the charges against him and to permit him to answer these charges. Furthermore, the list of overt acts adequately specifies the means by which Cauble Enterprises' affairs were conducted through a pattern of racketeering activity.

Count Two, brought under § 1962(a), charges Cauble with aiding and abetting six incidents of marijuana smuggling and with committing or aiding and abetting various acts of travel as part of a pattern of racketeering activity. It charges that Cauble received income from these activities and invested it in Cauble Enterprises. Cauble claims that this count fails to state an offense because it can be read consistently with innocence and fails to give notice of the amount of racketeering income invested in the enterprise and the nature of its investment.

The indictment charges Cauble with investing income derived from racketeering activity in an interstate enterprise. It lists the acts alleged as the pattern of racketeering activity. These are the essential elements of the offense charged.

Cauble nevertheless contends that the indictment did not put him on notice of the "source, amount, and nature of the 'income' . . . and the destination, amount and nature of the

'investment'. . . ." But the substantive offense charged is the "investment" of "income" in an enterprise and the indictment's wording makes clear that this is the charge against which Cauble must defend. The defendant is entitled to a "plain, concise statement of the *essential* facts constituting the offenses charged,"<sup>27</sup> but the indictment need not set forth every evidentiary detail necessary to establish the elements of the offense.<sup>28</sup>

Count Three, brought under § 1962(c), charges Cauble with conducting the affairs of Cauble Enterprises through a pattern of racketeering activity and incorporates by reference the allegations in Count Two that Cauble aided and abetted smuggling and acts of criminal travel. It thus puts Cauble on notice first that he is charged with conducting Cauble Enterprises' affairs through a pattern of racketeering and second that the acts of racketeering are those set forth in Count Two. Cauble argues that this count is vague because it fails to explain how its allegations are related to the holdings of Cauble Enterprises sought to be forfeited. The indictment is clear to all but the captious. It plainly and concisely states the charge and that suffices.<sup>29</sup>

Cauble contends that Count Two, charging investment in the enterprise, and Count Three, charging conduct of the

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<sup>27</sup> *United States v. Williams*, 679 F.2d 504, 508 (5th Cir.1982) (emphasis added), *cert. denied*, \_\_\_ U.S. \_\_\_, 103 S.Ct. 742, 74 L.Ed.2d 963 (1983).

<sup>28</sup> *Williams*, 679 F.2d at 508; *see* 1 L. Orfield, *Criminal Procedure Under the Federal Rules* § 7.53 (1966).

<sup>29</sup> Cauble also claims that there was a fatal variance between the indictment and the proof of the "enterprise." We consider that contention *infra* in our discussion of evidentiary sufficiency, for our rule is that the issue of variance is waived if not presented to the district court. *See United States v. Lerma*, 657 F.2d 786 (5th Cir. 1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1279, 71 L.Ed.2d 463 (1982); Fed.R. Crim.P. 12(b)(2).

enterprise, are multiplicitous.<sup>30</sup> Rule 12(b)(2) requires that defenses and objections based on defects in the indictment be raised before trial. In *United States v. Bradsby*, 628 F.2d 901, 905-06 (5th Cir. 1980), we held that a failure to raise the multiplicity argument before trial did not waive the right to object to multiple sentences. We reasoned that the defendant should not be forced to serve an erroneous sentence imposed on each count of a multiplicitous indictment because of waiver.

In this case, however, Cauble received a concurrent sentence on the allegedly multiplicitous counts. Therefore, this claim is arguably waived.

Even if not waived, this contention lacks merit. To sustain a conviction on Count Two the government must prove that the defendant derived and invested income. To convict on Count Three the government must satisfy the three-pronged test we have set out above.<sup>31</sup> These are plainly different offenses, requiring proof of different elements, so the counts are not multiplicitous.<sup>32</sup>

### C. The Evidence<sup>33</sup>

The government's proof focused on a series of smuggling episodes involving the shrimp boats MONKEY, JUBILEE, BAYOU BLUES, and AGNES PAULINE and their connec-

<sup>30</sup> Multiplicity is charging a single offense in more than one count. *United States v. DeLaTorre*, 634 F.2d 792, 794 (5th Cir.1981).

<sup>31</sup> See *supra* text accompanying note 24.

<sup>32</sup> See generally *Phillips*, 664 F.2d at 1014; *Martino*, 648 F.2d at 382-83. In both of those cases we rejected the contention that counts charging "conducting" and "conspiracy to conduct" were multiplicitous despite "considerable overlap in the evidence . . ." *Martino*, 648 F.2d at 383. These counts, by contrast, overlap only in that the government must prove the existence of an enterprise affecting interstate commerce.

<sup>33</sup> In reviewing a jury verdict of guilty, we view the evidence and all reasonable inferences from the evidence in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 62

tion to Cauble's trusted ranch foreman, Charles "Muscles" Foster.<sup>34</sup> The issue, as both trial counsel repeatedly stressed to the jury, was whether Cauble knew of the smuggling activities; no one contested that the smugglers used many of Cauble Enterprises' assets. Much of the government's evidence came from the mouths of "Cowboy Mafia" members and former Cauble Enterprises employees.

#### 1. January-February 1977: The Preliminaries

Raymond Hawkins, a confessed drug smuggler, met Foster in 1972 and the two became reacquainted in 1976.<sup>35</sup> Foster flew by commercial airliner to Thomasville, Georgia, near Hawkins' home, on February 1, 1977; Cauble Enterprises paid for the ticket. When Cauble made a \$25,000 loan to Foster from Cauble Enterprises funds on February 9, 1977, Foster told Cauble that the money was to be reloaned to Hawkins. Hawkins flew to New Jersey the next day to lease trucks to haul marijuana. Cauble Enterprises paid for the ticket and Hawkins used all or part of the \$25,000 to pay for the trucks.<sup>36</sup> Foster helped unload marijuana from the MONKEY on or about February 21, 1977.

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S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Beason*, 690 F.2d 439, 442 (5th Cir.1982), *cert. denied*, \_\_\_ U.S. \_\_\_, 103 S.Ct. 828, 74 L.Ed.2d 1023 (1983).

<sup>34</sup> Foster was a defendant in *Ruppel*. He was acquitted by reason of insanity. See 666 F.2d at 266.

<sup>35</sup> A load of marijuana arrived aboard the MONKEY in October 1976. The government did not charge that Cauble was involved with that load. Hawkins' story is related in detail in *United States v. Hawkins*, 658 F.2d 279 (5th Cir.1981).

<sup>36</sup> Cauble Enterprises loaned Foster \$6,000 more on February 22, 1977.

## 2. February-June 1977: The MONKEY

The smugglers decided to move the operation from Georgia to Texas. Hawkins met with Foster and Carlos Gerdes<sup>37</sup> several times to plan the new operation; Foster flew to these meetings aboard Cauble Enterprises' private plane.

On February 26, 1977, Foster, Gerdes, Cauble, and Ms. Fern Lynch flew from Denton to Houston; Cauble and Ms. Lynch deplaned in Houston and Cauble told the pilot to continue to Orange. On March 2, 1977, Foster flew to Thomasville to meet Hawkins and Gerdes. Gerdes gave Foster \$250,000 cash for setting up the Texas operation.<sup>38</sup> On March 4, Foster repaid his \$31,000 debt to Cauble Enterprises.

From March through May Cauble Enterprises loaned Foster \$18,000. Cauble Enterprises also paid for Foster's travel to Houston on May 11-13, 1977. The proceeds of a loan made on May 11 were used to reimburse Hawkins for building a privacy fence at Sneed's Shipyard in Orange, Texas, where the MONKEY was to arrive.

The MONKEY arrived in Orange on May 31, 1977. Foster had arranged for trucks and drivers<sup>39</sup> to haul the load to the L. R. Ranch near Meridian, Texas. The L. R. Ranch is owned

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<sup>37</sup>. Gerdes was also known as Carlos San Ramon. He was convicted and the conviction was affirmed by this court. *United States v. Hawkins*, 658 F.2d 279 (5th Cir.1981).

<sup>38</sup>. Foster showed a valise containing the money to pilot William McKesson, who testified that Foster stated: "Mr. Cauble knows [about the smuggling], but he just doesn't ask questions." McKesson claimed that he quit the job two days later. The defense impeached McKesson with his grand jury testimony that he "assumed that Mr. Cauble knew, but as far as he [Foster] saying that Mr. Cauble knew, he didn't say that." It also presented testimony that McKesson was fired for poor flying and that he flew Cauble Enterprises' plane after the day on which he claimed that he resigned.

<sup>39</sup>. The drivers were Willis Butler and Charles Talkington. Talkington pleaded guilty. Butler committed suicide.

by Cauble Enterprises. Foster paid the ranch foreman to take a vacation and the smugglers used the ranch for approximately two weeks in distributing the marijuana.<sup>40</sup>

Hawkins decided to move to Texas because smuggling was becoming more difficult in Florida and Georgia. He agreed to buy the Cherokee Ranch from Cauble Enterprises and paid Cauble \$100,000 down, in cash, which Cauble agreed not to report on his income tax return.<sup>41</sup> Hawkins also testified that he met Foster, Cauble, and Ms. Lynch in Cauble's bedroom three weeks after the MONKEY arrived and paid Foster \$250,000 in Cauble's presence; Foster then gave Cauble the money.<sup>42</sup>

### 3. June 1977—May 1978: The BAYOU BLUES

After he split with Gerdes, Hawkins set up his own marijuana smuggling venture. He bought the BAYOU BLUES

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<sup>40</sup> While the group was at the L.R. Ranch, Hawkins had a dispute with Gerdes and Foster left the group. Hawkins gave a pretrial statement in which he referred to a disagreement over his share and expressed the view that the smugglers were taking too many risks. He testified at trial, however, that he left the group because he thought that Gerdes was relying more on Foster's advice than on his.

<sup>41</sup> The date of this payment is unclear on the record. The government in brief states that it occurred at the "bedroom counting session." See *infra* note 42 & accompanying text. Hawkins' pretrial statement indicated that he made the payment about April 4, 1977. His testimony was that he made the payment at the counting session "approximately three weeks after the MONKEY came in."

<sup>42</sup> Hawkins' statement was that Foster handed two piles of \$125,000 to Cauble, saying of the second "this is your half." His trial testimony dwelled only on Foster's handing Cauble the money until the prosecutor refreshed his recollection about Foster's words.

Cauble denied that the meeting took place. On appeal, defense counsel also suggests that there is a question whether, if Cauble received the money, he did so as a bailee for Foster or as a principal. We do not see the relevance of this distinction; if the meeting occurred and



through Martin Sneed, Sr.<sup>43</sup> He and Foster used the Cauble Enterprises' plane to set up the deal.<sup>44</sup>

On September 12, 1977, Cauble flew to Las Vegas with Hawkins and others.<sup>45</sup> Cauble arranged for Hawkins to launder \$100,000 and, on his return to Denton, deposited the money in Hawkins' account at the Western State Bank.

On May 2, 1978, the BAYOU BLUES arrived at Sneed's Shipyard in Orange, Texas. Foster became involved in transporting and storing the marijuana at the last minute when one of the trucks did not appear. The smugglers took the marijuana to the Crockett Range in Crockett, Texas, which is owned by Cauble Enterprises. The next day, however, Foster told Hawkins to get the truck off the ranch. Also on May 2, Foster flew to Tampa at Cauble Enterprises' expense to buy a small boat.

On May 4, 1978, Cauble flew to Las Vegas. Foster had told Willis Butler, whom he owed \$50,000, that Butler could have the money in old bills or "the old man can go to Las Vegas and clean it up for you." Butler received \$50,000 in new \$100 bills and later used some of them to pay his lawyer. Twenty-five of

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Cauble was present, his knowledge of illegal activity afoot can hardly be doubted.

Hawkins also testified that: he told Cauble he was a drug smuggler; he smoked marijuana in Cauble's presence; he discussed smuggling with Ms. Lynch and Cauble; he gave Ms. Lynch marijuana cigarettes on one occasion; Cauble warned him that Foster was talking too much; and Foster told him several times that Cauble knew that Cauble Enterprises' ranches were being used for smuggling activities.

<sup>43</sup> Sneed, Sr. owned Sneeds' Shipyards, where the MONKEY had landed. He was convicted and his conviction was affirmed on appeal. *United States v. Hawkins*, 658 F.2d 279 (5th Cir.1981).

<sup>44</sup> Cauble required Foster and Hawkins to pay for using the plane. Cauble wrote "bills" by hand.

<sup>45</sup> Hawkins paid Cauble about \$3,200 for this plane trip.



the bills had been delivered by the Federal Reserve Bank to the Valley Bank of Nevada on May 4, 1978.

#### 4. June 1977—April 1978: the JUBILEE

While the BAYOU BLUES operation was underway, Gerdes' organization was also planning more smuggling ventures. On July 20, 1977, Gerdes, Foster, and others flew to Las Vegas aboard Cauble Enterprises' private plane to launder money.<sup>46</sup> Gerdes and others returned to Texas on July 26 and had breakfast with Cauble at Cauble's home; Cauble ordered the Cauble Enterprises pilot to fly Gerdes to his home in Knoxville, Tennessee.

Gerdes' organization sought a new boat in October 1977. Foster was looking for a boat at the same time, allegedly to begin a shrimping business. Cauble called two boat brokers on October 5, 1977, seeking a shrimp boat, and later sent Foster to look at a boat in Aransas Pass, Texas. Gerdes' lieutenants bought the JUBILEE in November 1977, after meeting Foster while looking for a suitable boat.<sup>47</sup>

The JUBILEE smugglers met in November 1977 at a Houston apartment leased by Cutter Bill's Western Wear, a business owned by Cauble Enterprises. In late 1977 Foster asked Cauble's lawyer's assistance in leasing a site suitable for a shrimping operation. The lawyer and Foster looked at several

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<sup>46</sup> Pilot Crownover testified that he was left alone for six days. When Crownover called Cauble for instructions, Cauble explained that he did not really know what was going on but told Crownover to "hang tight." Cauble Enterprises' phone log of incoming calls for this time was missing.

<sup>47</sup> The three met in Corpus Christi, en route to Aransas Pass, and again in Bayou La Batre, Alabama. Foster flew to Mobile, Alabama, the closest airport to Bayou La Batre, aboard the Cauble Enterprises plane on November 5, 1977. A "Mr. Carlos" telephoned Cauble on November 4, 5, and 7, 1977.

places an in January 1978 rented a site at High Island, Texas.<sup>48</sup> Foster had a large metal structure built at the water's edge.

On December 26, 1977 Foster flew aboard Cauble Enterprises' plane to Sarasota and picked up Gerdes. They then flew to Memphis and on to Houston; from there they boarded a commercial plane and flew to Las Vegas. On December 30 Cauble flew to Las Vegas. On January 1, 1978, Cauble delayed his party's takeoff from Las Vegas to converse with Gerdes at the airport.

The JUBILEE arrived at High Island on January 27, 1978. Eight smugglers, including Gerdes, Foster, and three Cauble Enterprises' employees<sup>49</sup> awaited the JUBILEE's arrival for a week at the Cutter Bill's apartment. The marijuana was unloaded and driven to the Crockett Ranch. Butler and Washington then took one truckload to the Mercer Ranch, near Fort Worth.<sup>50</sup> Cauble Enterprises also owns the Mercer Ranch. The

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<sup>48</sup> The owner of the High Island property told the attorney and Foster that it was unsuitable for a shrimping operation because it was too far from the Gulf, lacked facilities, and had no source of clean water for making ice. He and his brother later received \$15,000 from Foster, allegedly as salary and reimbursement for funds spent on materials and labor in building a fishhouse and drilling a well at High Island.

<sup>49</sup> Butler, Talkington, and Larry Washington.

<sup>50</sup> The Mercer Ranch was much-discussed after the second JUBILEE load. A smuggler known as "Big Nose" opened every sack of marijuana in the truck and some marijuana spilled and was left at the ranch. Foster told Larry Washington that the Texas Rangers had found the marijuana and that he would have to pay a judge \$10,000 to get the heat off.

Texas State Judge Byron Matthews told Cauble of a rumor that marijuana residue had been found at the Mercer Ranch. Cauble called Foster in and told him that a Texas Ranger had told Judge Matthews that there was marijuana at the Mercer Ranch. Foster denied knowing anything about it and this denial satisfied Cauble that the report was untrue.

smugglers distributed the marijuana from the Crockett Ranch during the next two weeks.

During February and March 1978, the Cauble Enterprises plane made three trips to Alcoa, Tennessee, near the home of John Ruppel.<sup>51</sup> On March 21, 1978, Foster and Gerdes flew by commercial aircraft to Memphis and Cauble Enterprises paid their fare.

On April 4, 1978, the JUBILEE arrived at High Island. For the week before its arrival the smugglers had again resided at the Cutter Bill's apartment. Butler and Washington again trucked the marijuana to the Crockett Ranch and the smugglers distributed it during the next two weeks.

In April or May 1978 Larry Washington called Cauble to find out whether Foster had left Washington \$5,000 due him from the second JUBILEE load. Washington asked whether Foster had left a package for him and Cauble said: "No. What was it?" Washington replied: "Money." Cauble told Washington to come to the ranch for the money. When he arrived, Cauble gave him a briefcase, which Washington had given to Foster, containing \$5,000; Cauble asked Washington if it was a loan or if Foster owed him the money.

#### 5. June-November 1978: The AGNES PAULINE

During June and July 1978, Foster flew to Tampa, Florida, Beaumont, Texas, and Knoxville, Tennessee, at Cauble Enterprises' expense. Foster, Butler, Washington, and James Holland discussed smuggling another load of marijuana in August 1978.

During August or September 1978, Cauble told Washington that Carlos had called to warn Cauble that Foster was talking

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<sup>51</sup> Ruppel was convicted on several charges in connection with the smuggling schemes. We affirmed his convictions in *United States v. Ruppel*, 666 F.2d 261 (5th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 102 S.Ct. 3487, 73 L.Ed.2d 1369 (1982).

too much and to say that he "didn't want to do any more business with" Foster. Cauble also warned Butler and Washington not to have any more dealings with Foster. Foster disappeared during August 1978.

The AGNES PAULINE arrived in Port Arthur, Texas, on November 29, 1978. It was seized by agents of the Drug Enforcement Administration.

#### 6. The Cash Deposits

During late 1976 and early 1977, Cauble Enterprises was burdened with debt. The partnership lost money during each of the years involved here except 1978, in which it broke even. In January 1978 Cauble Enterprises' special account at Western State Bank was \$100,000 overdrawn; it also showed a deficit balance on March 1, 1978.

On April 8, 1978, Cauble flew to Las Vegas to play in the World Series of Poker. He lost his \$10,000 entry fee but, when he returned to Texas, he told John Gray, Chairman of the Board of the Dallas International Bank, that he had won \$260,000 in a side game and wanted it worked into his accounts at the bank.<sup>52</sup> Gray suggested that Cauble take the money to "his own bank in Denton."<sup>53</sup>

At Western State Bank, Cauble Enterprises was on a list of persons and businesses exempt from the requirement that all cash deposits exceeding \$10,000 be reported to the Internal Revenue Service.<sup>54</sup> Cauble Enterprises deposited \$113,900 cash to its Western State Bank Special Account in April 1978;

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<sup>52</sup> At that time Cauble, either individually or through Cauble Enterprises, owned 20% of Dallas International Bank's stock. He later gained control of 55% of the bank's stock.

<sup>53</sup> Cauble or Cauble Enterprises owned 87% of the shares of the Western State Bank of Denton.

<sup>54</sup> See 31 U.S.C. § 1081 (1976); 31 C.F.R. § 103.22 (1981). Hawkins and Foster were also on this exempt list.

\$182,000 cash in May, and \$124,300 cash in June. Cash deposits in 1978 totaled more than \$692,000; cash deposits in 1977 amounted to approximately \$220,000; in 1976 cash deposits were \$14,600.<sup>55</sup>

#### D. *Challenges To The Evidence*

##### 1. *The Predicate Acts*

Cauble contends that the proof of the RICO predicate offenses was insufficient because the government failed to prove beyond a reasonable doubt that he aided and abetted either the smuggling episodes or the acts of travel. In determining whether the evidence is sufficient, we inquire whether a reasonable juror might have been convinced of the defendant's guilt beyond a reasonable doubt.<sup>56</sup>

To prove a person guilty of aiding and abetting, the government must show that the defendant associated himself with an unlawful venture, participated in it with the desire of accomplishing the illegal end, and sought by his actions to

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<sup>55</sup>. Total cash deposits in 1979 amounted to \$100,700. This figure included an \$80,000 deposit on January 9, 1979. The deposit slip stated that this amount was the remainder of Hawkins' down payment on the Cherokee Ranch.

Many of the carbon copies of deposit slips Cauble Enterprises turned over to the grand jury in response to its subpoena had hand- or typewritten notes explaining the source of the cash, such as "cattle sales" and "gambling winnings." These notations did not appear on the bank's original deposit slips. For example, a deposit slip dated March 17, 1978, for \$20,700 carried the notation "Down Payment on Sale of Cherokee Ranch to Raymond Hawkins." Cauble testified that the deposit was unrelated to the Cherokee Ranch sale but that he "may have" instructed the bookkeeper to type the information on the slip.

<sup>56</sup>. *United States v. Bell*, 678 F.2d 547, 549 (5th Cir.) (en banc), cert. granted on other grounds, \_\_\_\_ U.S. \_\_\_\_, 103 S.Ct. 444, 74 L.Ed.2d 600 (1982).

make it succeed.<sup>57</sup> The defendant must intend to commit the offense and participate in some manner to aid its commission, but need only aid and abet, rather than commit, each element of the crime.<sup>58</sup>

Cauble's brief states that the proof "nowhere discloses" that he was or could have been aware of any of the specific smuggling episodes or of the purpose of the airplane flights. This assertion is flatly contradicted by the record.

Both Hawkins and Washington testified that, in their opinion, Cauble knew about the smuggling. McKesson testified that Foster told him that Cauble knew about the smuggling. Although the evidence was contradicted, a reasonable juror might have believed it.

Furthermore, there was voluminous circumstantial evidence of Cauble's knowledge. This included several large loans to Foster from Cauble Enterprises, including one that was to be reloaned to Hawkins; Cauble's communications with Carlos Gerdes; his trips to Las Vegas; his paying for Foster to look for a boat; and his making significant changes in the business practices of Cauble Enterprises during the years in which the smuggling occurred.<sup>59</sup> There was also repeated testimony that only Cauble could authorize the use of the airplane. One pilot was dismissed for flying the plane to have it cleaned without Cauble's permission. This testimony provided support for the possible inference that Cauble knew of the various uses of the plane.

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<sup>57</sup>. *United States v. Ballard*, 663 F.2d 534, 542-43 (5th Cir.1981), modified, 680 F.2d 352 (5th Cir.1982) (per curiam).

<sup>58</sup>. *United States v. Fischel*, 686 F.2d 1082, 1087 (5th Cir.1982).

<sup>59</sup>. There was, for example, testimony that Foster never flew on the Cauble Enterprises' airplane without Cauble before late 1977. There was also evidence that Cauble Enterprises had cash deposits of only some \$14,600 in 1976 as opposed to \$200,000 in 1977 and \$692,000 in 1978.



A reasonable jury might have concluded on the record that Cauble knew of the drug-smuggling activities and knew the purpose of the acts of travel. Having reached the decision to reject Cauble's lack-of-knowledge defense, it might have concluded that Cauble was associated with, participating in, and seeking the success of a series of smuggling incidents. It might have decided that activities leading up to the ultimate acts of smuggling included the many acts of travel charged. In short, we are unable to say that a reasonable person would necessarily have entertained a reasonable doubt, after hearing the government's proof, that Cauble aided and abetted the acts of travel and the smuggling.

## 2. The Enterprise Element

Cauble argues that all of his RICO convictions must be set aside because the government failed to prove that he was in any way culpably connected with any enterprise. We treat this as a challenge to both the government's proof that there was a RICO enterprise and that there was a nexus between the enterprise, the racketeering activities, and Cauble.

Cauble contends that the government's proof demonstrated only that the racketeering activities were committed by and related to an enterprise-in-fact, the "Cowboy Mafia." Thus, he suggests, the government failed to adduce sufficient evidence to show that Cauble Enterprises was the RICO enterprise.

In *Turkette*, the Supreme Court held that the existence of an enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit."<sup>60</sup> In cases in which the govern-

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<sup>60</sup> 452 U.S. at 583, 101 S.Ct. at 2528, 69 L.Ed.2d at 254. Whether the government must prove the enterprise element with proof different from that used to demonstrate the pattern of racketeering activity seems to be an open question. See *United States v. Cagnina*, 697 F.2d 915, 920-21 (11th Cir.1983). Because in this case the evidence of these two elements did not coalesce, we need not address the question. Nor do we need to decide whether, as the court held in *United*



ment charges that a legal entity is the enterprise, proof that the entity has a legal existence satisfies the enterprise element. This is because, by definition, a legal organization such as a partnership has an ascertainable structure, operates as a continuing unit, and has a purpose common to its members and employees.

The government's proof demonstrated that Cauble Enterprises is as a limited partnership organized under the laws of Texas. It proved that the partnership has a formal organization and has operated continuously since 1972 for the purpose of seeking maximum long-term appreciation of the partners' capital. It demonstrated that Cauble Enterprises is an entity different from both the person, Rex C. Cauble, and the pattern of racketeering activity it sought to punish. Having shown that this entity existed, the government met the burden of proving the enterprise element.<sup>61</sup>

### 3. "Conducting" The Enterprise's Affairs "Through" A Pattern Of Racketeering Activity

Cauble contends that the government's proof demonstrated a nexus between the smuggling activity and the "Cowboy

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*States v. Bledsoe*, 674 F.2d 647, 664-65 (8th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 103 S.Ct. 456, 74 L.Ed.2d 608 (1982), it is essential that an enterprise have an ascertainable structure, operate as a continuing unit, and have a goal common to its members. *See Cagnina*, 697 F.2d at 921 (suggesting that this test conflicts with Fifth Circuit test). Here the enterprise had all of these characteristics.

<sup>61</sup> *See United States v. Griffin*, 660 F.2d 996, 999 (4th Cir.1981), *cert. denied*, 454 U.S. 1156, 102 S.Ct. 1029, 71 L.Ed.2d 313 (1982); *see also Bennett v. Berg*, 685 F.2d 1053, 1060 (8th Cir.1982) ("Legal entities are garden-variety 'enterprises' which generally pose no problem of separateness from the predicate acts"); *Hartley*, 678 F.2d at 987-90 (corporation as both enterprise and defendant); *cf. United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir.1982), (division of corporation may be RICO enterprise but cannot be RICO conspiracy defendant), *cert. denied*, \_\_\_ U.S. \_\_\_, 103 S.Ct. 729, 74 L.Ed.2d 953 (1983).

Mafia," rather than Cauble Enterprises. Therefore, he contends, the evidence was insufficient to prove that he "conducted" Cauble Enterprise's affairs "through" acts of racketeering.

Because we have concluded that a reasonable jury might have believed that Cauble aided and abetted the commission of the charged racketeering acts, we inquire whether his position in Cauble Enterprises facilitated the commission of the acts and whether the acts affected Cauble Enterprises. Based on the evidence, a reasonable jury might have concluded that none of the acts of travel would have occurred but for Cauble's ability to dispatch the Cauble Enterprises' assets to pay for commercial flights. Furthermore, a jury might reasonably have concluded that Cauble's position in Cauble Enterprises made it possible for him to make available the funds for loans, the ranches, and the other assets of the enterprise that the smugglers used. Therefore, the government's proof was sufficient to satisfy the requirement that the defendant's position in the enterprise facilitated the commission of the racketeering acts.

Finally, there is the question whether the racketeering acts affected the enterprise. In this case a reasonable juror might have concluded that the racketeering acts led directly to the successful smuggling ventures, which, in turn, led to the large cash deposits to Cauble Enterprises' account at Western State Bank. This is a sufficient effect to satisfy the test. We, therefore, conclude that the government successfully shouldered its burden of proving that Cauble conducted or participated in the conduct of the enterprise's affairs through a pattern of racketeering activity.<sup>62</sup>

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<sup>62</sup> This disposes of Cauble's challenge to his conviction under § 1962(c). This case is simply not like *United States v. Nerone*, 563 F.2d 836 (7th Cir.1977), cert. denied, 435 U.S. 951, 98 S.Ct. 1577, 55 L.Ed.2d 801 (1978), which Cauble relies on. In *Nerone* the court held that the government failed to prove the nexus between a legitimate corporation and gambling activity conducted on premises owned by

#### 4. The Conspiracy Count

Cauble was charged with conspiracy to conduct and participate in the conduct of Cauble Enterprises' affairs through a pattern of racketeering activity. He contends that his conviction under § 1962(d) must be reversed because the government failed to prove that he "agreed to join an enterprise by means of committing two predicate acts."

Our decisions establish that a § 1962(d) conviction requires proof of the enterprise and racketeering elements plus the defendant's objective manifestation of intent to participate, either directly or indirectly, in the affairs of the enterprise.<sup>63</sup> As we stated in *Phillips*, in order to prove a RICO conspiracy the government must prove "the additional element of agreement." 664 F.2d at 1012.<sup>64</sup>

A reasonable jury might have concluded that Cauble agreed to conduct Cauble Enterprises' affairs through a pattern of racketeering activity. It might have believed the direct testimony of Hawkins and Washington that Cauble was involved in the smuggling and, therefore, concluded that Cauble agreed

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the corporation. It stated: "[The government] made no attempt to show that the proceeds of the casino operation were invested in [the corporation]. Nor did it endeavor to show that gambling revenues were used by or in any way channelled into the corporation or that persons were paid out of gambling revenues to perform services for [the corporation]." 563 F.2d at 851. In this case a jury might have concluded that proceeds of smuggling were deposited to Cauble Enterprises' bank account and used in conducting the partnership's day-to-day affairs.

<sup>63</sup> *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir.), cert. denied, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978); see *Kopituk*, 690 F.2d at 1323.

<sup>64</sup> The agreement involved must include the vital element of agreeing to commit the predicate acts of racketeering. *Martino*, 648 F.2d at 383.

to commit or aid and abet the smuggling predicates.<sup>65</sup> It might have believed the circumstantial evidence that Cauble used Cauble Enterprises' assets to loan money to the smugglers and to finance their travel and, therefore, that Cauble agreed to commit or aid and abet the acts of travel. It might also have believed the circumstantial evidence that Cauble was aware that other assets were being used to arrange marijuana smuggling deals, to provide a haven for the smugglers, and to store and distribute marijuana. The evidence is sufficient to support Cauble's conviction on the conspiracy count.

### 5. The Investment Count

Cauble next contends that the evidence was insufficient to convict on the § 1962(a) count. He contends that the government failed to prove that he gained "income" from a pattern of racketeering activity. He also maintains that the government failed to prove that particular funds invested in the enterprise were derived from a particular unlawful transaction in which he was culpably involved.

Cauble argues that he derived no income because money advanced or loaned to the smugglers and later repaid was not "income." We need not decide the validity of this contention<sup>66</sup> because a reasonable juror might have concluded that Cauble received "income" based on the substantial cash deposits to Cauble Enterprises' special account during 1977 and 1978.

Cauble also argues that the government must do more to support a § 1962(a) conviction than prove that the income was

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<sup>65</sup> There was contradictory testimony on this point from Cauble and from James Holland. The decision which witnesses to believe was, however, for the jury. See *Elliott*, 571 F.2d at 884.

<sup>66</sup> The Supreme Court has agreed to consider our broad construction of the word "interest" in the RICO forfeiture provision, 18 U.S.C. § 1963(a)(1) (1976). *United States v. Martino*, 681 F.2d 952 (5th Cir.1982) (en banc), cert. granted sub nom. *Russello v. United States*, \_\_\_\_ U.S. \_\_\_\_, 103 S.Ct. 721, 74 L.Ed.2d 948 (1983).

derived from a pattern of racketeering activity. He contends that RICO's legislative history demonstrates that Congress intended to require the government to "trace" illicitly-derived funds from a particular unlawful act to the enterprise.

Cauble relies on the Justice Department's observation on a related bill that "tracing of funds known to be derived from racketeering activities to their eventual investment in a business enterprise [is required] in establishing a violation of subsection (a) of Section 1962."<sup>67</sup> He also relies on a law review article by one of RICO's primary sponsors stating "only one of the three provisions in Title IX requires tracing of funds."<sup>68</sup>

We do not impart to the word "tracing" as used in these statements the same precision as does Cauble. If the prosecution had demonstrated that Cauble made substantial, unexplained cash deposits into his personal account but not that the money was ever used in any way related to Cauble Enterprises, it would have failed to meet its burden of "tracing."<sup>69</sup> But the prosecution need prove only that illegally derived funds flowed into the enterprise;<sup>70</sup> it need not follow a trail of specific dollars from a particular criminal act.

The government presented evidence of large cash deposits to Cauble Enterprises' account and of marijuana smuggling in which Cauble and Cauble Enterprises' employees played a role.

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<sup>67</sup> *Measures Relating to Organized Crime, 1969: Hearings Before the Subcomm. on Criminal Laws and Procedure of the Senate Judiciary Comm.*, 91st Cong., 1st Sess. 387-88 (1969).

<sup>68</sup> McClellan, *The Organized Crime Act (S. 30) or its Critics: Which Threatens Civil Liberties?*, 46 Notre Dame Law. 55, 145 (1970). See 116 Cong. Rec. 18,941 (1970) (same; giving as example "FBI[s] trac[ing] money skimmed from Las Vegas casinos into Swiss bank accounts").

<sup>69</sup> Cf. *United States v. McNary*, 620 F.2d 621 (7th Cir.1980) (statute does not require showing of direct employment of illicit income).

<sup>70</sup> See, e.g., *Nerone*, 563 F.2d at 851, quoted in *supra* note 62.

The jury might reasonably have inferred that there was a sufficient nexus between the money and the enterprise to satisfy the "investment" requirement of § 1962(a).<sup>71</sup>

### E. Jury Instructions

Cauble challenges several of the court's instructions to the jury. Because his lawyers lodged no objection to the charge below, we review each of the allegedly defective instructions only for plain error.<sup>72</sup> This means that we will not reverse unless the instruction is so clearly wrong that our failure to notice it would result in a miscarriage of justice or would seriously affect the integrity or public reputation of the judicial proceeding.<sup>73</sup>

Cauble first claims that the trial judge erred in charging the jury on the enterprise element. He contends that the judge's instructions failed to make clear that the government was required to prove beyond a reasonable doubt that Cauble Enterprises was the RICO enterprise whose affairs were conducted through a pattern of racketeering activity. This instruction, Cauble claims, amounted to a directed verdict of guilt on the enterprise element.<sup>74</sup>

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<sup>71</sup> See *United States v. Parness*, 503 F.2d 430, 436 (2d Cir.1974) (given the nature of the enterprise involved, the government's inability to trace the proceeds of particular unlawful debt collections to the enterprise the defendant acquired was "not surprising"), *cert. denied*, 419 U.S. 1105, 95 S.Ct. 775, 42 L.Ed.2d 801 (1975).

<sup>72</sup> Fed.R.Crim.P. 30, 52(a).

<sup>73</sup> *United States v. Graves*, 669 F.2d 964, 971 (5th Cir.1982); *United States v. Thevis*, 665 F.2d 616, 645 (5th Cir.) (RICO case), *cert. denied*, \_\_\_ U.S. \_\_\_, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982). Patently not all prejudicial errors amount to plain error. See *United States v. Herzog*, 632 F.2d 469, 472 (5th Cir.1980); 6 L. Orfield, *supra* note 28, at 448.

<sup>74</sup> A directed verdict of guilt is always plain error. *United States v. Musgrave*, 444 F.2d 755, 762 (5th Cir.1971).



The trial judge defined "enterprise" by reading the statutory definition to the jury.<sup>75</sup> He then stated:

The "enterprise" charged in this case in Counts 1, 2 and 3 is Cauble Enterprises. Cauble Enterprises is a limited partnership formed pursuant to the laws of Texas with Rex C. Cauble as the sole general partner. Under the Texas Uniform Limited Partnership Act, as the general partner, Rex C. Cauble has the right to control and manage the affairs of Cauble Enterprises and is liable for all debts and obligations of Cauble Enterprises.

The judge then instructed the jury on the three substantive RICO counts. He prefaced his charge on each count with the admonition that "the Government must prove each of the following essential elements beyond a reasonable doubt." Each charge included the enterprise element and in no charge did the judge tell the jurors that Cauble Enterprises was the RICO enterprise.<sup>76</sup>

In short, the judge's instructions adequately conveyed to the jury the requirement that they conclude beyond a reasonable

<sup>75</sup> See *supra* note 13 & accompanying test.

<sup>76</sup> The relevant portion of the § 1962(a) charge stated:

Fourth: That the Defendant used or invested, directly or indirectly, any part of such income, in acquisition of any interest in, or the establishment or operation of *the enterprise*.

Fifth: That *the enterprise* engaged in, or its activities affected interstate or foreign commerce. (emphasis added.)

The § 1962(c) charge stated in pertinent part:

Fourth: That through the commission of two or more connected offenses the Defendant conducted or participated in the conduct of *the enterprise*.

Fifth: That *the enterprise* engaged in, or that its activities affected interstate or foreign commerce. (emphasis added.)

The § 1962(d) charge stated:

First: That a conspiracy to conduct or participate directly or indirectly in the conduct of the affairs of *an enterprise* engaged in or affecting foreign or interstate commerce through a pattern of racketeering activity, consisting of the commission of two or more acts or racketeering activity, was willfully formed by two



doubt that Cauble Enterprises was the RICO enterprise. The judge told the jurors that the enterprise *charged* was Cauble Enterprises; he never told them that the RICO enterprise *was* Cauble Enterprises. The directive left the jury free to conclude that the government failed to prove that Cauble Enterprises was the RICO enterprise. Accordingly, it was not plainly erroneous.

Cauble nevertheless argues that the trial judge's instruction on Count Three was wrong because it impermissibly combined the RICO enterprise and Cauble Enterprises.<sup>77</sup> But this part of the instruction was merely a summary of the indictment and not a direction to the jury. As our previous discussion of the charge demonstrates, the trial judge made a distinction between Cauble Enterprises and the RICO enterprise in instructing the jury about the elements of the offense. There was no plain error here.

Cauble next faults the district judge's failure to define the word "income" in the § 1962(a) count instructions. He argues that the failure was particularly prejudicial because "fund sources were a critical issue at trial."

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or more persons and was existing at the time alleged in the indictment.

Second: That the Defendant, with knowledge of the conspiracy, willfully became a member of the conspiracy by agreeing to participate directly or indirectly in the conduct of the affairs of *the enterprise*. . . . (emphasis added.)

<sup>77</sup> The judge stated that the indictment charged that:

Rex C. Cauble, individually and doing business as Cauble Enterprises, was employed by and was associated with an "*enterprise*" as defined by Title 18, United States Code, Section 1961(4). It is further alleged that the Defendant did unlawfully, knowingly and willfully conduct and participate, directly and indirectly, in the conduct of the affairs of *Cauble Enterprises*, through a pattern of racketeering activity. Count 3 further charges that *the alleged enterprise* did engage in and its activities did affect interstate and foreign commerce. (emphasis added.)

This ingenious transition from *sources* of income to *existence* of income points up the weakness of Cauble's argument. The defense did not dispute at trial and does not dispute now that Cauble Enterprises' Special Account received substantial deposits of cash. It disputed whether the funds came from drug smuggling or cattle sales. The judge's failure to define this word of common usage and meaning did not fall to the level of plain error.<sup>78</sup>

Cauble next challenges the trial judge's charge on the RICO predicates. He suggests that the judge's instruction that the jury could consider "any act" in violation of the Travel Act as an instance of racketeering activity impermissibly amended the indictment by allowing the jury to consider the Travel Act violations alleged in Counts Four, Nine, and Ten as RICO predicates even though they were not charged as such.<sup>79</sup>

The trial judge should have made it clear to the jurors that only the predicate acts alleged in the RICO counts could support a RICO conviction.<sup>80</sup> His failure to do so was not plain error, however, in view of his instruction to the jury that: "A separate crime or offense is charged against the Defendant in each count of the Indictment. Each offense and the evidence pertaining to it should be considered separately." We find no

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<sup>78</sup> *United States v. Anderton*, 629 F.2d 1044, 1049 (5th Cir.1980); *United States v. Crockett*, 506 F.2d 759, 762 (5th Cir.), cert. denied, 423 U.S. 824, 96 S.Ct. 37, 46 L.Ed.2d 40 (1975).

<sup>79</sup> The instruction read:

An act in violation of either of these statutes [18 U.S.C. § 1952 or 21 U.S.C. § 952] on one occasion would constitute "an act of racketeering activity" separate and apart from a later act in violation of the same statute.

<sup>80</sup> Contrary to the government's suggestion, merely drawing the jury's attention to the predicate offenses alleged during a summary of the indictment does not suffice to limit the jury's consideration on the RICO counts to the predicates. Nor does the district judge's instruction that "[i]n considering racketeering acts . . . you are limited to those acts charged in the *Indictment* . . ." (emphasis added).

miscarriage of justice in the trial judge's failure to make explicit what was implicit.<sup>81</sup>

Cauble finally assaults the judge's failure to instruct the jury that its verdict on the RICO predicates had to be unanimous. The judge stated that the government had to prove two acts of racketeering activity beyond a reasonable doubt, and that the jury's verdict had to be unanimous.<sup>82</sup> It might have been better practice to reinforce this by telling the jury that the jurors must be unanimous on each predicate, but had trial counsel made such a request the trial judge would have been able to consider it and likely would have granted it. When counsel sits idly by, the trial judge is not given the opportunity to reassess the charge. In the absence of objection, it was not necessary for the judge to elaborate this phase of the charge because he gave an express instruction that each juror had to agree to the verdict. No miscarriage of justice resulted from this omission.<sup>83</sup>

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<sup>81</sup>. Our task in evaluating jury instructions is to assess the instructions in the light of the entire trial to determine whether the charge adequately presented the issues to the jury. *Graves*, 669 F.2d at 970. Reversible error—much less plain error—does not occur so long as the charge viewed as a whole accurately frames the legal questions. See *United States v. Taylor*, 680 F.2d 378 (5th Cir.1982).

<sup>82</sup>. The judge also told the jury, in instructing on the Travel Act violations charged in Counts Four, Nine, and Ten that if it found beyond a reasonable doubt that "one method or mode of violating the law occurred, that is sufficient [to convict] so long as you agree unanimously on the particular mode or method involved." (emphasis added).

<sup>83</sup>. See *United States v. Raffone*, 693 F.2d 1343, 1347-48 (11th Cir.1982) (no plain error in failing to instruct jury that it had to agree unanimously on identity of conspirators); *id.* at 1350 (Anderson, J., concurring) (charge read as a whole fairly instructed jury it must be unanimous).

## II. THE RICO FORFEITURE

### A. Background

American antipathy for the English common law's "forfeiture of estate," which disinherited those unfortunate enough to be kin to felons, dates from the founding of the nation.<sup>84</sup> Criminal forfeiture has, therefore, been largely unknown in the United States.<sup>85</sup>

Congress added the forfeiture provisions<sup>86</sup> to RICO in order

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<sup>84</sup> 18 U.S.C. § 3563 (1976) states: "No conviction or judgment shall work corruption of blood or any forfeiture of estate." This provision was enacted as the Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117. See also U.S. Const. art. III, § 3, cl. 2. Forfeiture of estate meant that all of the convicted felon's chattels and goods went to the government and all of his land to his lord. See Weiner, *Crime Must Not Pay: RICO Forfeiture in Perspective*, 1 N. Ill. U.L. Rev. 225, 229-30 (1981).

<sup>85</sup> The lifetime estates of Confederate sympathizers were, however, forfeited during the Civil War. See *Miller v. United States*, 78 U.S. 268, 20 L.Ed. 135 (1870); *Bigelow v. Forrest*, 76 U.S. 339, 19 L.Ed. 696 (1869).

<sup>86</sup> (a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than \$25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

....

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation

to attack the sources of economic power of organized crime<sup>87</sup> in addition to removing from power and imprisoning those individuals who violate the statute. It viewed the sanctions and remedies against organized crime then available to the government as "unnecessarily limited in scope and impact."<sup>88</sup> As enacted the forfeiture provisions are meant to reach "the ill-gotten gains of criminals where they enter or operate an organization through a pattern of racketeering activity."<sup>89</sup>

### B. *Claims Of Error*

After finding Cauble guilty on the RICO counts, the jury responded to special interrogatories regarding the forfeiture

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of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

18 U.S.C. § 1963 (1976).

<sup>87</sup> See S.Rep. No. 617, 91st Cong., 1st Sess. 79 (1969).

<sup>88</sup> Statement of Findings and Purpose to Title IX, *reprinted at* 18 U.S.C. following § 1961 (1976); S.Rep. No. 617, 91st Cong., 1st Sess. 78-79 (1969).

<sup>89</sup> 116 Cong.Rec. 592 (1970) (remarks of Sen. McClellan). See also Comment, *RICO Forfeitures and the Rights of Innocent Third Parties*, 18 Cal.W.L.Rev. 345, 345 (1982) ("divorce the convicted defendant's corrupting influence from the corrupted enterprise") [hereinafter cited as *Rights of Innocent Parties*].

of his interest in Cauble Enterprises.<sup>90</sup> Cauble now launches a barrage of attacks against the validity of the forfeiture.

### 1. Due Process

Cauble first contends that the forfeiture violates the due process clause because it affects property rights of the limited partners of Cauble Enterprises, neither of whom were given notice of the forfeiture and an opportunity to be heard. He claims that the government may not partition the undivided partnership interest and remove the general partner without a finding against all owners that partnership property was used or acquired in violation of law.<sup>91</sup>

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<sup>90</sup> The interrogatories and the jury's answers to them read:

#### Interrogatory No. 1

Do you find from [sic] a reasonable doubt that Rex C. Cauble's interest in Cauble Enterprises was maintained in violation of 18 U.S.C., Section 1962?

Answer: We do.

#### Interrogatory No. 2

Do you find beyond a reasonable doubt that Rex C. Cauble's interest in Cauble Enterprises afforded a source of influence over the enterprise which he has operated, controlled, conducted or participated in the conduct of, in violation of Title 18, Section 1962?

Answer: We do.

#### Interrogatory No. 3

It is indisputed that Rex C. Cauble owns approximately one-third of the Limited Partnership known as Cauble Enterprises.

Do you find beyond a reasonable doubt that the Defendant, Rex C. Cauble, has made his interest in Cauble Enterprises, together with all of his contractual rights and offices therein, subject to forfeiture as a result of conviction of one or more of the offenses charged in Counts 1, 2 and 3 of the Indictment?

Answer: We do.

<sup>91</sup> The government claims that Cauble lacks standing to raise this issue. In view of our disposition of this claim we do not consider that argument.



Neither of the limited partners has sought to be heard in this case. Their remedy, as we made explicit in *United States v. L'Hoste*, 609 F.2d 796 (5th Cir.), *cert. denied*, 449 U.S. 833, 101 S.Ct. 104, 66 L.Ed.2d 39 (1980), is to petition the Attorney General for remission or mitigation of the forfeiture. As we stated in that case, "Congress plainly addressed the possible hardship that forfeiture could cause to those innocent parties holding an interest in forfeited property and gave responsibility to the United States, not the district court, to alleviate the hardship." 609 F.2d at 812.<sup>32</sup> This directive applies with equal force to the court of appeals.

Cauble asks that we distinguish *L'Hoste* on the grounds that it involved freely transferable corporate shares rather than undivided partnership interests and that it involved inchoate rather than vested property rights. These distinctions lack substance. The former would permit a defendant to avoid RICO forfeiture by forming a partnership, but not a corporation, with an innocent party; the latter would make the validity of federal RICO forfeitures subject to the nuances of state property law. Therefore, *L'Hoste* squarely controls this claim of error.

## 2. Conflict Of Interest

Cauble next contends that, because Cauble Enterprises' property interests were affected by the trial and consequent forfeiture, it was entitled to separate representation. He claims that trial counsel made an insufficient effort to demonstrate that there was no connection between the drug-smuggling conspiracy and Cauble Enterprises because he was

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<sup>32</sup> See *Rights of Innocent Parties*, *supra* note 89, at 355-58; see also *United States v. Mandel*, 505 F.Supp. 189 (D.Md.1981).

Judges Rubin and Tate adhere to the position stated in Judge Tate's dissent from the denial of rehearing en banc in *L'Hoste*. 615 F.2d 383 (5th Cir.) (Tate, J., dissenting), *cert. denied*, 449 U.S. 833, 101 S.Ct. 104, 66 L.Ed.2d 39 (1980).

more concerned with proving Cauble's lack-of-knowledge defense.

If Cauble Enterprises had been charged as a RICO defendant instead of or in addition to being charged as the enterprise, it would have been entitled to separate counsel.<sup>93</sup> But Cauble Enterprises was charged with no crime and suffers no punishment as a result of Cauble's conviction.

The forfeiture in this case is of Rex C. Cauble's property interest in Cauble Enterprises. It is *in personam*, imposed directly on a guilty person, rather than *in rem*, imposed on "guilty" property. Therefore, Cauble Enterprises had no stake in the proceeding and was not entitled to separate counsel.

### 3. Defects In The Indictment

Cauble next claims that the notice of forfeiture fails to advise him of the nature, cause, and extent of the forfeiture sought. These claims focus on the allegedly confusing character of the notice, were not presented to the district court, and do not assert that the indictment failed to charge an offense. Therefore, they are waived.<sup>94</sup> Even if not waived, however, these claims would not support a reversal. The purpose of the notice of forfeiture in the indictment is to inform the defendant that the government seeks forfeiture as a remedy.<sup>95</sup> Barebones pleading suffices so long as it puts the defendant on notice that the government seeks forfeiture and identifies the assets subject to forfeiture with sufficient specificity to permit the defendant to marshal evidence in their defense.<sup>96</sup> This the indictment did by noticing that the government sought to forfeit "the

<sup>93</sup> See, e.g., *Thevis*, 665 F.2d at 644-46; cf. *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981) (conflict possible when employer's lawyer represented employees).

<sup>94</sup> See *Lerma*, 657 F.2d at 789-90 (and cases cited therein).

<sup>95</sup> See Fed.R.Crim.P. 7(c)(2).

<sup>96</sup> *United States v. Boffa*, 688 F.2d 919, 939 (3d Cir.1982) ("by alleging that all of the appellants' interest in the enumerated corporations was subject to forfeiture, the indictment alleged the 'extent of

interests [sic] of Rex C. Cauble in Cauble Enterprises" and by listing thirteen assets included in Cauble Enterprises' holdings.

#### 4. Jury Instructions And Special Verdict

Cauble challenges the judge's charge to the jury and the adequacy of the special verdict form the jury completed in ordering the forfeiture. He claims that the instructions failed to inform the jury of its role in determining the scope of the defendant's interest in the enterprise, in effect directing a verdict on the extent of the forfeiture.

The judge explained the forfeiture allegation in the indictment to the jury, stated that the government sought to forfeit only Cauble's one-third interest in Cauble Enterprises, and re-summarized the allegations of all three RICO counts. He then read the forfeiture provision, § 1963(a), to the jury and added " [I]f you find beyond a reasonable doubt that the Defendant is guilty of any of the offenses charged in Counts 1, 2 or 3 of the Indictment, it will be your duty to determine whether the government has proven beyond a reasonable doubt that Rex C. Cauble's interest in Cauble Enterprises is subject to forfeiture to the United States." The judge also gave the jury the special forfeiture verdict.<sup>97</sup>

Before considering Cauble's claims of error, we pause to explain briefly how some of the complaints he raises can be avoided in future RICO trials. The substantive jury charge in

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the interest or property subject to forfeiture' " required by Rule 7(c)(2)), *cert. denied*, \_\_\_ U.S. \_\_\_, 103 S.Ct. 1272, 75 L.Ed.2d 494 (1983); *United States v. Grammatikos*, 633 F.2d 1013, 1024 (2d Cir.1980) (same); see *United States v. Peacock*, 654 F.2d 339, 351 (5th Cir.1981) *modified*, 686 F.2d 356 (5th Cir.1982) (*per curiam*), *petition for cert. filed*, \_\_\_ U.S. \_\_\_, 103 S.Ct. \_\_\_, 75 L.Ed.2d \_\_\_, 51 U.S.L.W. 3512 (U.S. Nov. 23, 1982) (No. 82-1069).

<sup>97</sup> See *supra* note 90. The special verdict was essentially identical to the one we approved in *L'Hoste*, 609 F.2d at 813.

these trials is ordinarily extremely long<sup>98</sup> and requires the jurors to pay close attention to a number of definitions and elements. Therefore, it is not surprising that the instructions on forfeiture, which ordinarily come at the end of the substantive charge, are often brief—perhaps excessively so.

To ease the jurors' task in determining guilt or innocence, the forfeiture issue should be withheld from them until after they have returned a general verdict. At that time the trial judge can instruct the jurors fully about forfeiture and submit the special verdict to them. Such a bifurcated trial—using, of course, only one jury—is not only convenient for the judge and fairer to the defendant. It also prevents the potential penalty of forfeiture from influencing the jurors' deliberations about guilt or innocence.

That practice was not followed here, but Cauble made no objection to the judge's method, instructions, or special verdict form. We, therefore, review only for plain error.

Cauble argues that the instructions failed to inform the jury that only interests "acquired or maintained" in violation of § 1962 or "affording a source of influence over the enterprise" are subject to forfeiture. He claims that the instructions and verdict form made it appear that a RICO conviction carried a penalty of automatic forfeiture of his entire interest in Cauble Enterprises. This claim is belied, however, by the fact that the judge read § 1963(a) to the jury and, therefore, used the precise words Cauble emphasizes in defining the interest subject to forfeiture. Furthermore, the special verdict specifically asked the jury whether Cauble's interest in Cauble Enterprises afforded him a source of influence over the enterprise. Although the judge might have expanded the entire forfeiture charge and emphasized this point in his instructions, the

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<sup>98</sup> The charge in this case was the longest the trial judge had ever given. It took him approximately one and one-half hours to deliver and covers 55 pages in the trial transcript.

charge he gave, read together with the special verdict form, accurately presented the relevant legal issue to the jury.

Cauble next argues that the jury was not informed that it had to find a nexus between the racketeering activity and the property claimed. We agree that proper jury instructions should "include language that suggests that a jury *may* find an interest or contractual right forfeitable if there is evidence linking the defendant's conduct to the property interest and the government has proved such a nexus beyond a reasonable doubt."<sup>99</sup> Nevertheless, the omission of this charge did not amount to plain error. The substantive RICO instructions required the government to prove that Cauble conducted the enterprise's affairs through a pattern of racketeering activity. Therefore, the jury had already found beyond a reasonable doubt a link between Cauble's conduct, the enterprise, and the racketeering activity.

Furthermore, the second question in the special verdict form required the jury again to find beyond a reasonable doubt that Cauble "conducted" the enterprise through a pattern of racketeering activity. The jury answered the question affirmatively and, therefore, found the nexus required. The omission of the nexus instruction from the forfeiture charge was not plain error.

Cauble next claims that the charge made it impossible for the jurors to render anything but a blanket verdict of forfeiture because they were not furnished a list of the Cauble Enterprises' assets so that they might forfeit only those that were the basis for Cauble's control and were not asked to determine what "manner of forfeiture" would deprive him of his influence over the enterprise.<sup>100</sup> Cauble emphasizes the minor role of some of Cauble Enterprises' assets and the absence of evidence

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<sup>99</sup> Weiner, *supra* note 84, at 252 n. 105 (emphasis in original).

<sup>100</sup> The government correctly points out that Cauble's claim that Cauble Enterprises does not own some of the assets listed in the Notice of Holings Subject to Forfeiture is made for the first time in

that some assets were involved at all. This argument, however, is based on an incorrect view of the operation of RICO's forfeiture provisions.

The RICO forfeiture is *in personam*: a punishment imposed on a guilty defendant. It deprives that defendant of all of the assets that allow him to maintain an interest in a RICO enterprise, regardless whether those assets are themselves "tainted" by use in connection with the racketeering activity. Thus, in *United States v. Hess*, 691 F.2d 188, 190-91 (4th Cir. 1982), the court held that the jury may not find that less than the full amount of the defendant's interest in an enterprise is subject to forfeiture because § 1963 is mandatory. The court concluded that the only issues for the jury are whether the defendant violated RICO and what interest the defendant held in the enterprise.<sup>101</sup>

In *United States v. Huber*, 603 F.2d 387, 396 (2d Cir. 1979), *cert. denied*, 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 758 (1980), the jury was "required to specify which corporations were part of the enterprise and the percentage of [the defendant's] interest in each." The indictment in that case, however, charged an enterprise-in-fact composed of a number of corporations. Therefore, it was necessary for the jury to decide which corporations were, in fact, part of the enterprise.<sup>102</sup>

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this court. At trial Cauble's attorney asked him: "Every asset that you have, and that [your wife] has, and that [your son] has, is an asset of Cauble Enterprises?" Cauble replied: "Yes, sir." He testified that Cauble Enterprises even owned the suit he was wearing.

<sup>101</sup> Here that Cauble owned approximately a one-third share of Cauble Enterprises was undisputed.

<sup>102</sup> Indeed, the *Huber* court expressly stated: "*Given the nature of the enterprise alleged, it was obviously necessary for the jury to say which entities were part of it . . . in order to determine the 'extent of the . . . property subject to forfeiture.'*" 603 F.2d at 396 (emphasis added).



In this case, however, the enterprise charged was a single pre-existing legal entity. Once Cauble was convicted his interest in that entity was subject to forfeiture in accordance with § 1963(a). The jury was not required to select only certain of that entity's assets for forfeiture, just as the jury in *Huber* was not required to determine which assets or divisions of the several corporations were subject to forfeiture.<sup>101</sup>

### 5. Sufficiency Of The Evidence

Cauble's challenge to the sufficiency of the evidence supporting forfeiture reargues his claim that there is no culpable connection between Cauble's conduct and the forfeited property. For the reasons in our discussion of the sufficiency of the evidence to support the substantive RICO convictions, we conclude that a reasonable juror might have been persuaded of such a nexus beyond a reasonable doubt.

Cauble further argues that, even if the evidence supports a connection between bank accounts, assets, and entities, this proof does not justify forfeiture of Cauble's entire undivided interest in Cauble Enterprises. We reiterate that property forfeited under RICO need not be "guilty." RICO forfeiture is aimed at divorcing guilty persons from the enterprises they have corrupted. A reasonable juror might have been persuaded that this task would be accomplished by forfeiting Cauble's share of Cauble Enterprises.

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<sup>101</sup> In *Grammatikos*, the government sought to forfeit fourteen pieces of property. The judge submitted a list of nine items to the jury, which forfeited two under the provisions of 21 U.S.C. § 848(a)(2) (1976). 633 F.2d at 1024. By contrast in this case the government sought forfeiture of only one "piece" of property: Cauble's share of Cauble Enterprises. The jury was asked whether that "item" was subject to forfeiture and concluded that it was. See *United States v. Tunnell*, 667 F.2d 1182, 1188 (5th Cir.1982) (jury not required to determine what part of motel used in prostitution enterprise and what part used legally).

## 6. Character Of Cauble's Interest

Cauble finally argues that, because his general partnership interest in Cauble Enterprises is "not exercisable or transferable for value by the United States,"<sup>104</sup> it is subject only to expiration and not to forfeiture. He argues that a forfeiture order installing the United States as general partner of Cauble Enterprises is impermissible under both the partnership articles and Texas law.

The language in § 1962(c) on which Cauble relies has been construed only once.<sup>105</sup> In that case we noted that the defendant's offices in various unions and employee benefit plans could not meaningfully be transferred to the United States and were, therefore, subject only to termination.<sup>106</sup>

Every court that has considered the broader question what "interests" are subject to forfeiture has concluded that § 1963(a) requires forfeiture of interests in the nature of ownership of or control over an enterprise.<sup>107</sup> Cauble's general partnership interest in Cauble Enterprises is a source both of

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<sup>104</sup> 18 U.S.C. § 1963(c) (1976).

<sup>105</sup> *United States v. Rubin*, 559 F.2d 975 (5th Cir.1977), *vacated*, 439 U.S. 810, 99 S.Ct. 67, 58 L.Ed.2d 102 (1978), *aff'd in relevant part*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864, 100 S.Ct. 133, 62 L.Ed.2d 87 (1979).

<sup>106</sup> 559 F.2d at 992 & n. 18.

<sup>107</sup> *See Martino*, 681 F.2d at 957 n. 18 (interests such as stock holdings or real property ownership and interests affording influence on or control over enterprise); *United States v. Thevis*, 474 F.Supp. 134, 143 (N.D.Ga.1979) (assuming forfeitability of "capital interest in a partnership"), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982). *See generally* Annot., 61 A.L.R.Fed. 879 (1983).

ownership and control. This interest is a property interest, valuable and heritable. It is not merely a "position."<sup>108</sup>

The forfeiture provision of RICO is designed to prevent a convicted defendant from being replaced by the enterprise or from exercising control over the enterprise's affairs *in absentia*.<sup>109</sup> In *McNary*, the court upheld forfeiture of the defendant's partnership interest in a family-owned travel service. 620 F.2d at 622, 628-29. In *L'Hoste*, we upheld forfeiture of a stockholder's interest in a corporation. 609 F.2d at 809, 812.<sup>110</sup> There is no reason to make the effect of a forfeiture depend on the form of the enterprise's organization. Accordingly, we hold that Cauble's general partnership interest in Cauble Enterprises is forfeitable to the United States.

### III. THE TRAVEL ACT COUNTS

Counts Four, Nine, and Ten charge Cauble with aiding and abetting or causing acts of travel in violation of § 1952. Count Four alleges as a violation Foster's flight from Denton to Thomasville on March 3, 1977. Count Ten alleges a flight from Denton to Bogata, Colombia on December 12, 1976.

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<sup>108</sup> In *Rubin*, we stated that Congress' goal of eradicating the economic base of organized criminal activity translated readily into eliminating "ownership interests" and "self-perpetuating economic power." 559 F.2d at 922.

<sup>109</sup> See 116 Cong. Rec. 591 (1970) (remarks of Sen. McClellan) ("experience has shown that it is insufficient to merely remove and imprison individual mob members"); *id.* at 607 (remarks of Sen. Bryd) (legislation removes leaders of organized crime from positions of ownership, prevents them and their associates from regaining control, and visits heavy economic sanctions).

<sup>110</sup> See also, e.g., *Huber*, 603 F.2d at 396 (shares of various corporations). The only commentator who has discussed this point states: "[A] continuing proprietary right in the nature of a partnership or stock ownership . . . would obviously be subject to forfeiture under section 1963(a)(2)." Weiner, *supra* note 84, at 245 (footnote omitted).

Cauble claims that Count Four is multiplicitous of the RICO predicate charging a Travel Act violation based on Foster's return flight from Thomasville to Denton. This contention is arguably waived for the reasons we have discussed above.<sup>111</sup>

The contention, if not waived, is meritless. First, each act of interstate travel constitutes a separately punishable offense.<sup>112</sup> Second, even if this indictment in fact charged the same trip as a RICO predicate and a substantive offense, an indictment charging RICO predicates as separate offenses is not multiplicitous.<sup>113</sup>

Cauble next contends that the indictment failed to charge an offense because it did not allege the conduct or omission constituting the violation of the law. The essential elements of a Travel Act violation are travel in interstate commerce, specific intent to promote, manage, establish, or carry on "unlawful activity," or to distribute the proceeds of unlawful activity, and knowing and willful commission of an act in furtherance of that intent subsequent to the act of travel. Because the statute fully and unambiguously sets out the essential elements of the

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<sup>111.</sup> See *supra* text following note 30.

<sup>112.</sup> E.g., *United States v. Alsobrook*, 620 F.2d 139, 142 (6th Cir.), cert. denied, 449 U.S. 843, 101 S.Ct. 124, 66 L.Ed.2d 51 (1980). Cauble argues in brief that *Alsobrook* stands for the proposition that each round trip under the Travel Act is a separate unit of prosecution. Yet that court stated: "the grand jury could have indicted Alsobrook in separate counts for each of his trips to Michigan." 620 F.2d at 142 (emphasis added). This despite the fact that the return trips charged were stricken from the indictment. *Id.* n.3.

<sup>113.</sup> In *Peacock*, we held that double jeopardy is not offended by the imposition of consecutive sentences on a RICO count and a mail fraud count charged both as a separate crime and a RICO predicate. 654 F.2d at 348-49. Implicit in that holding is the conclusion that the counts did not charge the same crime. See *United States v. Boylan*, 620 F.2d 359, 360-61 (2d Cir.), cert. denied, 449 U.S. 833, 101 S.Ct. 103, 66 L.Ed.2d 38 (1980).

offense, indictments drafted substantially in its language are sufficient.<sup>114</sup>

Cauble finally claims that the evidence is insufficient to support his conviction on these counts. The district judge limited the jury's consideration to aiding and abetting, for the evidence demonstrated that Cauble did not travel on any of these occasions.

Cauble argues that his conviction on Count Four cannot stand because there was no evidence he knew Foster was traveling to distribute marijuana proceeds or was involved in marijuana smuggling in 1977. A reasonable jury might, however, have believed the testimony of William McKesson that Foster told him or implied to him that Cauble knew about the smuggling activities. It could also have believed from the other evidence detailed above<sup>115</sup> that Cauble was associated with and participating in the venture and, by paying for tickets, loaning money, and allowing use of the airplane, was acting to make it succeed. Therefore, the evidence was sufficient to convict on Count Four.

Cauble claims that the evidence was insufficient to convict on Count Nine because he merely furnished the airplane to Foster without knowledge that it would be used for criminal purposes.<sup>116</sup> He suggests that his testimony that he made repeated phone calls inquiring why Foster had not returned proves that he did not know of the activity.

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<sup>114</sup> See generally *United States v. Ramos*, 666 F.2d 469, 474 (11th Cir.1982). For cases holding that the Travel Act sets out the elements of the offense with sufficient clarity to permit indictments framed in the statutory language, see *Spinelli v. United States*, 382 F.2d 871, 888 (8th Cir.1967) (en banc), *rev'd on other grounds*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Turf Center, Inc. v. United States*, 325 F.2d 793, 796 (9th Cir.1963).

<sup>115</sup> See *supra* notes 35-38 & accompanying text.

<sup>116</sup> One cannot be convicted of aiding and abetting without knowledge of the criminal venture. *United States v. Williams*, 569 F.2d 823 (5th Cir.1978).

The jury, however, apparently chose not to believe Cauble's testimony.<sup>117</sup> It instead seems to have believed Pilot Crownver's testimony that Cauble told him to "hang tight" for six days. A reasonable jury might have concluded from the evidence that Cauble knew the purpose of the trip and was guilty as an aider and abettor.

Cauble argues that his conviction on Count Ten must be reversed because Cauble Enterprises' mere payment for a ticket, for which it was later allegedly reimbursed, is insufficient to "cause" an act of travel absent evidence of Cauble's knowledge of or participation in a marijuana smuggling scheme. The evidence supporting this conviction is Hawkins' testimony that Foster told him that he was going to Colombia to set up a gig, Cauble Enterprises' payment for the ticket, and its loan of \$3,500 to Foster on December 10, 1976. Cauble claimed that the loan was for a vacation and that the price of the ticket was repaid.<sup>118</sup> Although the question is a close one, we conclude that a reasonable juror might infer from this evidence that Cauble knew the purpose of the trip.

#### IV. THE BANK MISAPPLICATION COUNTS

Cauble challenges the convictions under § 656 on the ground that the indictment fails to state an offense and the evidence is insufficient to support a conviction. Each count is predicated on a bank loan made to Charles Foster at Cauble's request.

Count Five charges that Cauble willfully misapplied \$37,706 of Western State Bank's funds on March 13, 1978. Count Six charges that Cauble willfully misapplied \$10,000 of South Main Bank's funds on March 31, 1978. Count Seven charges that

<sup>117</sup> No calls to Las Vegas appear on Cauble's telephone bill during this period. The Cauble Enterprises log of incoming and outgoing calls was missing. See *supra* note 46 & accompanying text.

<sup>118</sup> Cauble claims in brief that the evidence of reimbursement is "undisputed." The testimony was: "Q: You paid for the ticket for him? A. He paid it back." The jury was not required to believe this "undisputed" evidence.



Cauble willfully misapplied \$50,000 of Western State Bank's funds on May 2, 1978. Count Eight charges that Cauble willfully misapplied \$50,000 of South Main Bank's funds on May 30, 1978. Each loan was ultimately repaid in full; Cauble personally guaranteed the \$37,000 loan and the \$50,000 South Main loan.

Cauble argues that the indictment fails to charge a crime because it does not allege what acts constituted the "willful misapplication" subjecting him to criminal liability. The essential elements of a violation of § 656 are that the accused was a bank officer, the bank was connected in some capacity with a national bank, the accused willfully misapplied bank funds, and the accused acted with intent to injure or defraud the bank.<sup>119</sup> We have long held that an indictment framed in the statutory language charges on offense under § 656 and that the term "willful misapplication" is not so vague as to require supplementation by further averment.<sup>120</sup> This claim of error is, therefore, without merit.

Cauble next claims that the evidence was insufficient to support his convictions. He contends first that consent by the bank to a loan is a defense to the charge of willful misapplication. Therefore, he urges, the board of directors' approval of the loan charged in Count Seven and the loan committee's

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<sup>119</sup>. *United States v. Welliver*, 601 F.2d 203, 207 (5th Cir.1979).

<sup>120</sup>. *United States v. Broome*, 628 F.2d 403, 405 (5th Cir.1980) (per curiam); *Welliver*, 601 F.2d at 207-08; *United States v. Davis*, 592 F.2d 1325 (5th Cir.), cert. denied, 442 U.S. 946, 99 S.Ct. 2894, 61 L.Ed.2d 318 (1979); *United States v. Marin*, 517 F.2d 259, 267 (5th Cir.1975); cert. denied, 423 U.S. 1087, 96 S.Ct. 878, 47 L.Ed.2d 97 (1976); *United States v. Bearden*, 423 F.2d 805, 810-11 (5th Cir.), cert. denied, 400 U.S. 836, 91 S.Ct. 73, 27 L.Ed.2d 68 (1970). Other circuits are in accord. See *United States v. Duncan*, 598 F.2d 839 (4th Cir.), cert. denied, 444 U.S. 871, 100 S.Ct. 148, 62 L.Ed.2d 96 (1979); *United States v. Fortunato*, 402 F.2d 79 (2d Cir.1968), cert. denied, 394 U.S. 933, 89 S.Ct. 1205, 22 L.Ed.2d 463 (1969).

approval of the loan charged in Count Eight compels reversal of these convictions.

Although some cases state that the bank's consent to a loan is a complete defense to a willful misapplication charge,<sup>121</sup> it is not clear that consent alone is an absolute bar. Thus, in *Mulloney v. United States*, 79 F.2d 566, 583 (1st Cir. 1935), *cert. denied*, 296 U.S. 658, 56 S.Ct. 383, 80 L.Ed. 468 (1936), the court said: "It is, no doubt, true that consent by a bank to a loan would be a defense to the crime of willful misapplication, since there could be no conversion of funds if there was a valid consent by the bank or its board of directors." The court found no valid assent, however, because a disinterested majority of the board had never approved the transaction.

However, in a number of other cases courts have held that knowledge,<sup>122</sup> ratification,<sup>123</sup> and consent<sup>124</sup> are not *per se* defenses to the charge. Instead these are evidentiary matters that may be considered as part of the defense that there was

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<sup>121</sup> Cauble relies on *United States v. Britton*, 108 U.S. 193, 2 S.Ct. 526, 27 L.Ed. 701 (1883) for the proposition that the bank's consent is a defense. That case involved the question whether an indictment failing to allege that the board of directors did not consent charged a crime under the predecessor to § 656. There is language in *Britton* that may be construed as recognizing a consent defense. *See id.* at 197, 2 S.Ct. at 529, 27 L.Ed. at 702; *United States v. Sorensen*, 330 F.Supp. 642, 645-46 (D.Mont.1971).

<sup>122</sup> *Stout v. United States*, 227 F. 799, 802-03 (8th Cir.1915), *cert. denied*, 241 U.S. 664, 36 S.Ct. 549, 60 L.Ed. 1227 (1916); *Keliher v. United States*, 193 F. 8, 15 (1st Cir.1912).

<sup>123</sup> *Simpson v. United States*, 229 F. 940, 945 (9th Cir.), *cert. denied*, 241 U.S. 668, 36 S.Ct. 552, 60 L.Ed. 1229 (1916).

<sup>124</sup> *United States v. Morse*, 161 F. 429, 435 (C.C. S.D.N.Y.1908) ("authority" to commit a crime impossible), *aff'd per curiam*, 174 F. 539 (2d Cir.), *cert. denied*, 215 U.S. 605, 30 S.Ct. 406, 54 L.Ed. 346 (1909); *Rieger v. United States*, 107 F. 916, 925 (8th Cir.), *cert. denied*, 181 U.S. 617, 21 S.Ct. 923, 45 L.Ed. 1030 (1901).

either no willful misapplication or no intent to injure the bank. As the court stated in *United States v. Breese*, 173 F. 402, 410 (C.C.W.D.N.C. 1909), *aff'd* 203 F. 824 (4th Cir. 1913), "The most formal vote of the board of directors could not authorize the embezzlement, abstraction, or willful misapplication of the funds of the bank." In *Mann*, we rejected the contention that the indictment must allege that the misapplication was without the consent of the bank or its directors. We stated, citing *Mulloney* and *United States v. Klock*, 210 F.2d 217 (2d Cir. 1954): "consent is a matter of defense." 517 F.2d at 268. In *United States v. Riley*, 550 F.2d 233 (5th Cir. 1977), the trial court excluded evidence that the bank frequently allowed other persons to conduct business as the defendant had. We reversed the conviction, reasoning that although "a general practice is not an absolute defense to criminality . . . the wiser . . . approach is to let the jury consider the practice in determining whether [the defendant] intended to injure and defraud the bank." *Id.* at 236. We stated that *Mann* had "implicitly recognized" that the jury should consider whether the bank's consent vitiated the defendant's intent to injure or defraud the bank and added:

The government's contention that [the defendant] was the chief executive officer of the bank and therefore could not rely on this [authorization] defense is a jury argument, not a legal one. The jury might have rejected this defense as a sham. It might have considered the alleged policy to be [the defendant's] cynical generosity to a few cronies at the expense of others, but that was for the jury to resolve.

In *United States v. Salina*, 654 F.2d 319 (5th Cir. 1981), the defendant contended that a series of loans could not constitute criminal misapplication because they were authorized by the bank's board of directors. We stated:

[W]hile valid consent by a bank's board of directors may be a defense to a charge of misapplication, no such board can vitiate a fraud on the bank. Thus, if the [defendants] . . . had an intent to defraud, "approval of the board of directors is no longer material to whether there was a misapplication of bank funds." The jury . . . found such an intent; the fact that the board of directors may have re-

viewed the loan at some point does not absolve the [defendants] from culpability.<sup>125</sup>

Patently an entire bank board, acting unanimously, could not without violating the statute invest bank funds to purchase a boatload of marijuana or make a loan secured only by a chattel mortgage on a kilogram of cocaine. Approval by the bank is a factor, indeed an important one, to be considered in deciding whether making of the loan itself constituted a misapplication and whether a defendant had the intent to injure or defraud the bank required to sustain a conviction under § 656. But is it not a complete defense.

Cauble next argues that his personal guarantee of the loans charged as misapplications in Counts Five and Eight serves as a complete defense. He contends that, because the purpose of § 656 is to protect national banks, their customers, and the Federal Deposit Insurance Corporation from losses,<sup>126</sup> there

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<sup>125</sup> 654 F.2d at 328 (quoting *United States v. Beran*, 546 F.2d 1316, 1321 (8th Cir.1976), *cert. denied*, 430 U.S. 916, 97 S.Ct. 1330, 51 L.Ed.2d 595 (1977)). Cauble argues in brief that this exception to the consent defense applies only when the case involves a "fraud" on the bank. This reading is unacceptably narrow, particularly because typically the allegations of the indictment and jury instructions are that in misapplication cases the defendant intended to "injure or defraud" the bank. There is no reason why bank directors should be unable to approve of a "fraud" on themselves but able to approve an "injury."

Furthermore, we stated in *Salinas*: "Review by the board is a particularly dubious basis for exculpating the [defendant] in this case, since the evidence showed that [the defendant] was the moving force behind the board of directors." 654 F.2d at 328 n. 12. Given Cauble's large measure of control over the banks in question, it would ignore reality for us to hold that the board of directors' or loan committee's "approval" of a transaction is a complete defense.

<sup>126</sup> See *United States v. Barket*, 530 F.2d 181, 186 (8th Cir.1975); *cert. denied*, 429 U.S. 917, 97 S.Ct. 308, 50 L.Ed.2d 282 (1976); *Garrett v. United States*, 396 F.2d 489, 491 (5th Cir.), *cert. denied*, 393 U.S. 952, 89 S.Ct. 374, 21 L.Ed.2d 364 (1968).

can be no violation of the statute when the loan is guaranteed by a solvent party.

Conviction under § 656 does not require proof that the bank suffered a loss.<sup>127</sup> But the government must demonstrate more than that the defendant was guilty of maladministration or that funds were irregularly or improperly used.<sup>128</sup> Nonetheless, ultimate restitution is not a defense to the crime of willful misapplication because the crime is complete at the time the misapplication occurs.<sup>129</sup> The gravamen of the offense under § 656 is the defendant's depriving the bank of "its right to have custody of its funds, that is, the right to make its own decisions as to how the funds are used." *United States v. Dreitzler*, 577 F.2d 539, 546 (9th Cir. 1978), *cert. denied*, 440 U.S. 921, 99 S.Ct. 1246, 59 L.Ed.2d 473 (1979).<sup>130</sup>

Therefore, that the defendant personally guaranteed a misapplied loan does not absolve him absolutely from criminal responsibility. The bank is deprived of custody of and control over its funds when the loan is made and remains so deprived until either the borrower or guarantor repays the money. The existence of a personal guarantee is certainly relevant in determining whether the defendant acted with intent to injure or defraud the bank, but it does not negate such an intent as a matter of law.<sup>131</sup>

<sup>127</sup> See, e.g., *United States v. Landers*, 576 F.2d 94, 96 (5th Cir.1978).

<sup>128</sup> See, e.g., *United States v. Christo*, 614 F.2d 486, 490 (5th Cir.1980); *Beran*, 546 F.2d at 1320.

<sup>129</sup> See *Duncan*, 598 F.2d at 858; *United States v. Southers*, 583 F.2d 1302, 1305-06 (5th Cir.1978); *Beran*, 546 F.2d at 1322; *United States v. Caldwell*, 544 F.2d 691, 697 (4th Cir.1976).

<sup>130</sup> See also *Farrell*, 609 F.2d at 819 ("diverting bank funds from their intended purposes"); *Golden v. United States*, 318 F.2d 357, 360-61 (1st Cir.1963).

<sup>131</sup> Venerable Supreme Court precedent supports this conclusion. In *Agnew v. United States*, 165 U.S. 36, 48, 53-56, 17 S.Ct. 235, 240, 242-43, 41 L.Ed. 624, 625, 626 (1897), the Court held that the defend-

Intent in a § 656 case is "basically a question for the jury."<sup>132</sup> It exists if the defendant acts knowingly and the natural result of his conduct is or may be to injure the bank; there is no requirement that the accused desire the injury.<sup>133</sup>

Here a reasonable juror might have inferred Cauble's intent to defraud from all of the circumstances. These include Foster's financial incapability<sup>134</sup> and mental instability,<sup>135</sup> the illicit purpose of the loan, which the jury might reasonably have concluded Cauble knew; Cauble's cash-poor situation and the weakness of his guarantee, given his involvement in a major smuggling operation, the diversion of the bank's assets, and Cauble's disregard for the bank's routine procedures.<sup>136</sup> A

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ant was not entitled to a jury charge that if from his guaranty the debt should be paid, the jurors might find that there was no intent to injure and defraud the bank. The Court did not suggest that the guaranty was an absolute defense. See also *Dreizler*, 577 F.2d at 544, 546; *Fortunato*, 402 F.2d at 80.

<sup>132</sup> *United States v. Thomas*, 610 F.2d 1166, 1174 (3d Cir.1979) (per curiam); *United States v. Schoenhut*, 576 F.2d 1010, 1024 (3d Cir.), cert. denied, 439 U.S. 964, 99 S.Ct. 450, 58 L.Ed.2d 421 (1978).

<sup>133</sup> *United States v. Farrell*, 609 F.2d 816, 820 (5th Cir.1980); *United States v. Killian*, 541 F.2d 1156, 1159-60 (5th Cir.1976).

<sup>134</sup> Foster's salary when the loans were made was \$250 per week. He apparently had no significant personal assets.

<sup>135</sup> Foster had been treated for mental illness on a number of occasions. Dr. Donald Whaley, a clinical psychologist who had treated Foster, testified that in April 1978 Foster's mental condition had deteriorated seriously. He stated that he met Cauble in early 1978 and discussed Foster, who was then "in very bad shape."

<sup>136</sup> For example, Ben Walker, former Executive Vice-President of Western State Bank, testified about the two loans to Foster charged as misapplications. He stated that he received no credit history or financial statement, did not know whether Foster was employed, and had never had any personal dealings with Foster. In response to the question whether it was "routine" to give loans of that size based on so little information, he stated: "Only from [sic] a director asking us to do it." No director except Cauble had asked the bank to "give loans of



reasonable jury might have concluded that Cauble's personal guarantee and the directors' or committee's consent was simply insufficient to negate an inference of intent from these facts.<sup>137</sup>

Cauble finally argues that the jury was permitted to convict him of misapplication on a "reckless disregard" standard. In *United States v. Adamson*, 700 F.2d 953 (5th Cir. 1983) (en banc), we held that the proper *mens rea* for a § 656 conviction is "knowledge" rather than "reckless disregard." We added, however: "Where sufficiency is at issue, a finding that the accused acted recklessly may be enough to sustain a jury verdict, because a jury may properly *infer* the requisite intent." *Id.* at 962 (emphasis in original).

Although this case was tried before *Adamson* was decided, the jury instruction on intent precisely stated this standard.<sup>138</sup> Cauble nevertheless argues that the instruction on reckless

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that amount to that sort of people." Walker also testified that it was "[n]ot uncommon" for Cauble to ask the bank to make loans.

Peter Brooks, President of South Main Bank, testified that he knew nothing about Foster and would not have loaned him money but for Cauble's guarantee. Cauble was a director of South Main and owned a large block of bank stock; he eventually acquired 75 percent of the bank's shares. The bank made the loans although Brooks did not know Foster's employment status or salary and had no loan history information.

<sup>137.</sup> We emphasize that, had Cauble's trial attorneys asked for a jury instruction to the effect that the guarantee and the approvals should be considered in determining intent, the district judge should have given such a charge.

<sup>138.</sup> The judge told the jurors:

Intent to injure or defraud the bank, within the meaning of this statute, means to act knowingly, that is with knowledge. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. The element of intent to injure or defraud is not fulfilled by a mere showing of indiscretion or

disregard permitted the jury wrongly to convict him solely because he authorized loans to Foster, who was emotionally unstable. This claim of error essentially asks us to reinterpret the facts and conclude that Cauble's actions were not, after all, reckless. We decline this invitation. A reasonable jury might have concluded that Cauble acted with intent to injure or defraud the banks. That is the limit of our inquiry.

Cauble had a fair trial. Trial counsel was able and diligent. The trial court's rulings were considered and impartial. After appraising the post-conviction attack on virtually every aspect of the complex proceeding, we are satisfied that the indictment properly charged offenses punishable under the laws of the United States, and that the evidence sufficed to persuade a reasonable jury. Its verdict is, in the ancient words, the verdict of the country. The judgment of conviction and forfeiture entered on that verdict is, accordingly, **AFFIRMED**.

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neglect on the part of the bank officer. However, intent to injure or defraud may be inferred from acts knowingly done with a reckless disregard for the interests of the bank. Further, it is not necessary that actual injury to the bank be shown.

**APPENDIX B****NOTICE OF HOLDINGS SUBJECT TO FORFEITURE**

Pursuant to Title 18, United States Code, Sections 1963(a)(1) and (2) and the violation of Title 18, United States Code, Sections 1962(a)(c) and (d) as alleged in Counts I, II and III of this indictment, the United States of America gives notice that the interests of Rex C. Cauble in Cauble Enterprises, as more fully described in the Articles of Limited Partnership of Cauble Enterprises of July 21, 1972, attached hereto and made a part of this pleading as if set forth herein, are subject to forfeiture.

Such holdings of Cauble Enterprises subject to forfeiture include the following:

1. Cutter Bill's Western World  
Houston, Texas
2. Cutter Bill's Western World  
Dallas, Texas
3. Rite Weld Company  
Texas and Oklahoma
4. Miley Trailer Company,  
California and Texas
5. Dallas International Bank  
Dallas, Texas
6. L. R. Cauble Ranch,  
Meridian, Bosque County, Texas
7. Turner Ranch,  
Denton County, Texas
8. Headquarters Ranch  
Denton, Denton County, Texas
9. Crockett Ranch  
Leon County, Texas
10. T. E. Mercer Ranch  
Ft. Worth, Tarrant County, Texas

11. South Wayside Ranch  
13601 South Wayside  
Houston, Harris County, Texas
12. South Main Bank  
Houston, Harris County, Texas
13. Western Bank of Denton  
Denton, Denton County, Texas

## APPENDIX C

### ASSETS LISTED IN INDICTMENT AND FORFEITURE ORDER

ASSETS <sup>1</sup>	WHETHER A PROPERTY OF CAUBLE ENTERPRISE [C.E.]	ANY EVIDENCE ABOUT PROPERTY	WHETHER CULPABLE CONNECTION EXISTS <sup>2</sup>
1. Cutter Bill Stores & Houston and Dallas 2	yes	None. Some evidence re: an apartment in Houston leased by Foster in the name of C.E. with smugglers as occasional guests. 9R. 1050	None. No connection between realty or assets of Cutter Bill and smuggling.
3. Ritewald Company Texas and Oklahoma <sup>3</sup>	partially <sup>4</sup>	None	None
4. Miley Trailer	no [8R. 848] <sup>5</sup>	None	None

<sup>1</sup> Cauble Enterprises owns over 24 additional ranches, farms, and tracts stretched over 3,000 acres and over 41,000 shares of stock.

<sup>2</sup> Once there has been a finding that the asset is the property of Cauble Enterprises with evidence about it in the record demonstrating a culpable connection between the defendant's activities and the property, the government must, as we show in Argument, meet three other requirements before forfeiture may ensue: 1. There must be an alleged connection; 2. there must be a jury finding of such connection on proper instructions; and 3. there must be notice and hearing and a jury trial to interested co-owners.

<sup>3</sup> There are no RiteWeld Co. stores in Oklahoma. Cauble Enterprises is the parent to Oklahoma Welders Supply Company which has two Oklahoma stores owned by Rex Cauble individually.

<sup>4</sup> The issue of proprietary interest is uncertain on this record. Transactions between Cauble Enterprises, Riteweld Company, and Oklahoma Welders Supply Company raise both factual and legal questions as to amount and degree of Cauble Enterprise interest.

<sup>5</sup> See n. 4, *supra*.

ASSETS <sup>1</sup>	WHETHER A PROPERTY OF CAUBLE ENTERPRISE (C.E.)	ANY EVIDENCE ABOUT PROPERTY	WHETHER CULPABLE CONNECTION EXISTS <sup>2</sup>
5. Dallas Int'l Bank	no <sup>6</sup>	None	None
6. L. R. Cauble Ranch Meridan, Texas (3,731 acres)	yes	Evidence that Foster used barn on ranch to store M II load for 9 days to 2 weeks. 7R. 450	Depends on issue of Rex Cauble's knowledge and consent to use.
7. Turner Ranch (832 acres)	yes	Some evidence that a pickup truck had a fuel pump repaired by a non-conspirator. 9R. 1047-1049	None
8. Headquarters Ranch Denton, Texas (572 acres)	yes	Alleged counting session here.	Depends on occurrence of session, participation with knowledge by Cauble, and nature (i.e., bailment v. payment) of transfer between Foster and Cauble.
9. Crockett Ranch (4,667 acres)	yes	Evidence that Foster used barn to store Jubilee I and Jubilee II briefly. 7R. 540	Depends on knowledge and consent by Cauble.

<sup>6</sup> According to Tex. Rev. Civ. Stat. Ann., art. 6132a, § 4, and the Certificate of Limited Partnership of Cauble Enterprises, a limited partnership is prohibited from ownership or participation in the business of banking.



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ASSETS <sup>1</sup>	WHETHER A PROPERTY OF CAUBLE ENTERPRISE (C.E.)	ANY EVIDENCE ABOUT PROPERTY	WHETHER CULPABLE CONNECTION EXISTS <sup>2</sup>
10. Mercer Ranch (1,388 acres)	partially <sup>7</sup>	Evidence that Foster used to store Jubilee I load. 9R. 1061	Depends on knowledge and consent by Cauble for use.
11. South Wayside Ranch (20 acres)	yes	Washington picked up motor boat of Foster stored here for use in finding spot for Jubilee I unloading. 9R. 1060	Depends on whether Cauble knew boat stored here and for what purpose
12. South Main Bank Houston, Texas	no <sup>8</sup>	None	None. (§ 656 is not a predicate).
13. Western State Bank Denton, Texas	no	Evidence that case proceeds from cattle sales deposited	None. Cash deposits from sale of cattle as evidenced by Gov. Exh. 59

<sup>7</sup> Approximately 20% is owned by non-partners.

<sup>8</sup> See n. 6, *supra*.

**APPENDIX D**

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT.

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**No. 82-2087**

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UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

REX C. CAUBLE, Individually and  
doing business as Cauble Enterprises,  
*Defendant-Appellant.*

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**Appeal From The United States District Court  
For The Eastern District Of Texas**

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**ORDER:**

The motion of appellant for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including OCTOBER 10, 1983, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

FILED: Aug. 19, 1983

/s/ A. B. Rubin

A. B. RUBIN

UNITED STATES CIRCUIT JUDGE

**APPENDIX E**  
**CONSTITUTIONAL AND STATUTORY PROVISIONS**  
**INVOLVED**

**AMENDMENT V [1791]**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**AMENDMENT VIII [1791]**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**18 U.S.C. § 3563. Corruption of blood or forfeiture of estate**

No conviction or judgment shall work corruption of blood or any forfeiture of estate.

**18 U.S.C. § 1962. Prohibited activities**

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another

to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 942.)

#### **18 U.S.C. § 1963. Criminal penalties**

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than \$25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

(Added Pub.L. 92-451, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943.)



# APPENDIX F

## PATTERN OF IMPORTATION

DATE	AMOUNT	SHIP	BACKER(S)	WORKER(S) <sup>1</sup>	POINT OF ARRIVAL	RECORD PROOF
<b>CONSPIRACY NO. 1</b>						
10/76	35-40,000 lbs.	[MONKEY]	Ruppel & Gerdes	Hawkins Hamm Holland	Savannah, Georgia	6R. 240 & 11R. 1654 7R. 476, 480-81 11R. 1624, 1679
1/77	35,000 lbs.	MONKEY[I]	Gerdes	Hawkins Holland Hamm	Savannah, Georgia	11R. 1680 11R. 1645 7R. 480
6/1/77	35,000 lbs.	MONKEY[II]	Gerdes	Washington <sup>2</sup> Holland Hamm Hawkins [Foster]	Orange, Texas	9R. 1049 11R. 1656 7R. 539 & 486 6R. 244
<b>[BREAKUP OF GERDES-HAWKINS RELATIONSHIP ON 6/2/77] 6R. 265, 7R. 447, 7R. 491, 11R. 1656-61 and 6R. 346 &amp; 358</b>						
1/27/78	37,000 lbs.	JUBILEE[I]	Gerdes Ruppel	Washington Holland Hamm [Foster]	High Islands, Texas	9R. 1056 11R. 1665 7R. 539
4/4/78	30,000 lbs.	JUBILEE[II]	Gerdes Ruppel	Washington Holland Hamm [Foster]	High Islands, Texas	9R. 1065 11R. 1666 7R. 539
<b>CONSPIRACY NO. 2</b>						
5/2/78	35,000 lbs. [40,000 lbs; 9R. 1032]	BAYOU BLUES	Hawkins & Hamm	Washington [Foster]	Orange, Texas	6R. 267; 11R. 1670 9R. 1072
<b>CONSPIRACY NO. 3</b>						
11/29/78	40,000 lbs.	AGNES PAULINE	Holland Ruppel(?)	Washington	Port Arthur, Texas	11R. 1645 & 1673 11R. 1688; 1703

<sup>1</sup>Only represents those workers who testified at trial.

<sup>2</sup>Fixed fuel pump. 9R. 1047-1049.

<sup>3</sup>Did not testify.

[NB: Total amount of marijuana imported: 207,000 lbs. (Over 103 tons; in indictment)]

No. 83-585

Supreme Court, U.S.  
FILED

DEC 23 1983

ALEXANDER L. STEVAS  
CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1983

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REX C. CAUBLE, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

REX E. LEE

*Solicitor General*

STEPHEN S. TROTT

*Assistant Attorney General*

DAVID B. SMITH

*Attorney*

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### QUESTIONS PRESENTED

1. Whether the trial court's instruction on the "enterprise" element of the racketeering counts constituted plain error.

2. Whether the judgment of criminal forfeiture in this case was broader in scope than that permitted under 18 U.S.C. 1963 (a) or in violation of petitioner's constitutional rights.

3. Whether the evidence was sufficient to sustain petitioner's conviction on a charge of conducting an enterprise "through" a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c).

4. Whether the forfeiture judgment violated the due process rights of the limited partners of Cauble Enterprises, the racketeering enterprise charged in the indictment.

5. Whether petitioner's conduct constituted misapplication of bank funds within the definition of 18 U.S.C. 656.

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18 U.S.C. 1962(d) .....	2, 11
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## Miscellaneous:

S. Rep. No. 91-617, 91st Cong., 1st Sess. (1969)....	8-9
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**In the Supreme Court of the United States**

OCTOBER TERM, 1983

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No. 83-585

REX C. CAUBLE, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**OPINION BELOW**

The opinion of the court of appeals (Pet. App. 1a-58a) is reported at 706 F.2d 1322.

**JURISDICTION**

The judgment of the court of appeals was entered on May 21, 1983. A petition for rehearing was denied on August 11, 1983. The petition for a writ of certiorari was filed on October 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Texas, petitioner was convicted of operating Cauble Enterprises,<sup>1</sup> a Texas limited partnership, through a pattern of racketeering activity, in violation of 18 U.S.C. 1962 (c); investing the proceeds of racketeering activity in a legitimate interstate business enterprise, in violation of 18 U.S.C. 1962(a); conspiracy to violate the Racketeer Influenced and Corrupt Organizations statute, in violation of 18 U.S.C. 1962(d); three counts of violating the Travel Act, 18 U.S.C. 1952(a); and four counts of misapplication of bank funds, in violation of 18 U.S.C. 656. The jury also returned a special verdict forfeiting petitioner's interest in Cauble Enterprises, the racketeering enterprise charged in the indictment. Petitioner was sentenced to ten concurrent terms of five years' imprisonment. The court also entered a judgment of criminal forfeiture in accordance with the jury's verdict. The court of appeals affirmed (Pet. App. 1a-58a).

The evidence at trial, which is partially summarized by the court of appeals (Pet. App. 14a-23a), showed that petitioner, a multi-millionaire Texas businessman, was in effect "the range boss of the highly publicized 'Cowboy Mafia',<sup>2</sup> a loosely-knit group

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<sup>1</sup> Petitioner Rex C. Cauble was the general partner of Cauble Enterprises. Petitioner's wife and adopted son are the limited partners. Petitioner's share of the partnership was approximately 31%.

<sup>2</sup> The exploits of the "Cowboy Mafia" are chronicled in more detail in several earlier decisions of the court of appeals. See *United States v. Ruppel*, 666 F.2d 261 (5th Cir.), cert. denied, 458 U.S. 1107 (1982); *United States v. Hamm*, 659 F.2d 624

responsible for importing and distributing over 147,000 pounds of marijuana from 1976 through 1978" (*id.* at 2a). A final boatload of 44,000 pounds of marijuana was seized by DEA agents at Port Arthur, Texas, on November 29, 1978, and thus was never distributed. Several employees of Cauble Enterprises were arrested on the boat (*id.* at 21a-22a; 9 Tr. 1095-1099, 1101; 11 Tr. 1674-1676; 13 Tr. 2121-2122). "The issue, as both trial counsel repeatedly stressed to the jury, was whether Cauble knew of the smuggling activities; no one contested that the smugglers used many of Cauble Enterprises' assets" (Pet. App. 15a).

Petitioner caused Cauble Enterprises and banks controlled by Cauble Enterprises to make numerous unsecured loans to one Charles "Muscles" Foster, a trusted ranch foreman who acted as petitioner's dupe in the drug smuggling ventures.<sup>3</sup> The loans to Foster totalled over \$200,000 in 1977 and 1978. These loans were made in a highly irregular manner. The loan money was used to prepare for and facilitate the drug smuggling activities in various ways (*id.* at 15a-16a; 7 Tr. 523, 526-527, 547-564, 577-581, 626-637, 643-644, 652; 8 Tr. 679-686; 9 Tr. 1012, 1070-1071, 1194-1196; 12 Tr. 1949-1951; 13 Tr. 2151-2155; GX 1, 25, 33, 42, 45). Petitioner placed Cauble Enterprises' private aircraft and pilots at the disposal of

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(5th Cir. 1981) (*en banc*); *United States v. Hawkins*, 658 F.2d 279 (5th Cir. 1981).

<sup>3</sup> Foster was shown to be mentally unstable and devoted to Cauble like a son. Although he played a key role in the conspiracy, he had been acquitted by reason of insanity (8 Tr. 698-699, 702-710, 713-718, 721-723, 726-729, 735-736, 752, 773, 776-778; 9 Tr. 981-984, 1088-1090; 11 Tr. 1674-1675; 13 Tr. 2045, 2048).

the smugglers. They flew the aircraft on numerous trips throughout Texas and the South in furtherance of their scheme (Pet. App. 16a-21a). Petitioner himself flew to Las Vegas on September 12, 1977, with two of the principal smugglers in order to launder drug money at a casino (*id.* at 18a; 6 Tr. 378-382; 9 Tr. 1039-1040, 1184, 1214-1218; 10 Tr. 1316; 12 Tr. 1899; DX3).<sup>4</sup> The smugglers used a number of ranches owned by Cauble Enterprises to store and distribute the loads of marijuana (Pet. App. 16a-21a). They also used a Houston apartment leased by Cutter Bill's Western Wear, a retail clothing business owned by Cauble Enterprises, as a rendezvous point while waiting for two of the marijuana boatloads to arrive (*id.* at 19a-21a). In addition, petitioner used two banks controlled by Cauble Enterprises to deposit cash drug proceeds without complying with the currency transaction reporting requirements of the Bank Secrecy Act, 31 U.S.C. 1081 and 1058.<sup>5</sup> Finally, peti-

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<sup>4</sup> Petitioner flew to Las Vegas again on May 4, 1978, to launder more money for the smugglers (Pet. App. 18a-19a). Petitioner also used Cauble Enterprises' money to pay for numerous flights by Foster aboard commercial airlines in furtherance of the smuggling scheme.

<sup>5</sup> At Western State Bank of Denton, Texas, Cauble Enterprises, Foster and another major smuggler named Raymond Hawkins were improperly placed on a list of people and businesses exempt from the normal requirement that deposits of more than \$10,000 in cash be reported to the Treasury for use by law enforcement authorities. Foster was also improperly placed on the exempt list at South Main Bank of Houston (Pet. App. 22a-23a; 7 Tr. 456, 572-575; 8 Tr. 683; 10 Tr. 1365-1376, 1380-1381, 1386-1388; 13 Tr. 2112-2113, 2121).

Petitioner was thwarted in his attempt to use a third bank, in which Cauble Enterprises owned 20% of the stock, to launder \$260,000 in drug proceeds (Pet. App. 22a).

tioner employed several of the professional or management personnel of Cauble Enterprises to carry out various tasks in furtherance of the smuggling scheme. In an attempt to hide his drug profits, petitioner directed Cauble Enterprises' bookkeeper, Carolyn McConnell, to falsify bank deposit slips subpoenaed by a grand jury so as to indicate a legitimate source for the cash income (Pet. App. 23a n.55; 8 Tr. 813-817, 833, 871, 877-887, 897-898, 906; 9 Tr. 931-947, 961-962, 972-980, 1015-1025, 1198-1199; 10 Tr. 1222; 13 Tr. 2068-2069, 2081-2088). One of Cauble Enterprises' lawyers, Robert Parker, assisted Foster in leasing a suitable island site on the Intracoastal Waterway at which to unload the marijuana (11 Tr. 1504-1510, 1515-1516, 1523-1524, 1533, 1538, 1540-1541, 1545-1550, 1553-1555, 1576-1577). Another Cauble Enterprises' bookkeeper, Elliott Black, managed the bank account of James Thompson Seafood, a phony front company set up for the purpose of disguising the marijuana smuggling operation (7 Tr. 626-637, 643-644; 8 Tr. 681-686; 13 Tr. 2151-2155; GX 25, 33).

Apart from the evidence showing how petitioner used Cauble Enterprises' assets and personnel in furtherance of the smuggling scheme, there was direct testimony that petitioner knew of and participated in the scheme. Most of this evidence is detailed in the opinion of the court of appeals (Pet. App. 16a-22a).

## ARGUMENT

1. Petitioner contends (Pet. 8-10) that the district court committed plain error in charging the jury on the enterprise element of the racketeering counts. He argues that the court's instructions failed to make clear that the government was required to prove beyond a reasonable doubt that Cauble Enterprises was the RICO enterprise whose affairs were conducted through a pattern of racketeering activity. According to petitioner, the court's instructions amounted to a directed verdict of guilt on the enterprise element.

This claim is meritless. In a RICO case involving a legitimate business enterprise, as opposed to an illegal association-in-fact of the type involved in *United States v. Turkette*, 452 U.S. 576 (1981), it is difficult to imagine how a jury question could be presented concerning the existence of the enterprise. Here, there was certainly no dispute about the existence of Cauble Enterprises. Thus, it would not have been erroneous to omit any instruction on the enterprise element in this case.

Moreover, as the court of appeals noted (Pet. App. 32a-33a), the trial judge did draw a clear distinction between Cauble Enterprises and the RICO enterprise in instructing the jury about the elements of the RICO counts. "The judge told the jurors that the enterprise *charged* was Cauble Enterprises; he never told them that the RICO enterprise *was* Cauble Enterprises" (*id.* at 33a; emphasis in original). The charge on each RICO count included the enterprise element, and the judge prefaced his instructions with the admonition that the government must prove each of the elements beyond a reasonable doubt (*id.* at 32a). We note that petitioner, who was represented

by four expert trial lawyers, made no objection to any part of the court's jury instructions.\*

2. Petitioner next raises a welter of objections (Pet. 10-15) to the scope of the criminal forfeiture judgment in this case and to the manner in which the forfeiture question was presented to the jury. Each of these arguments lacks merit.

Petitioner contrasts traditional civil *in rem* forfeitures with criminal *in personam* forfeitures and suggests that the latter are somehow unfair.<sup>7</sup> But a defendant in a criminal forfeiture case has all of the protections that apply to any other criminal case. The owner of property subject to civil *in rem* forfeiture has far fewer substantive and procedural rights. The government typically needs to show only probable cause to believe the property is subject to forfeiture. The burden then shifts to the claimant-owner to show, by a preponderance of the evidence, that the property is not forfeitable. 19 U.S.C. 1615. And in civil *in rem* forfeitures the property of a wholly innocent owner may be forfeited. *Calero-*

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\* Petitioner's statement (Pet. 8) that "proof of the enterprise element coalesced with that of the 'pattern of racketeering activity' conducted by the 'Cowboy Mafia'" is without meaning. The enterprise pleaded and proved was Cauble Enterprises. The pattern of racketeering activity was the drug smuggling activities of the "Cowboy Mafia." In contrast to the *Turkette* situation involving an illegitimate association-in-fact, the enterprise element here was totally distinct from the pattern of racketeering activity.

<sup>7</sup> Petitioner raised no constitutional issue regarding the forfeiture in the courts below, except for the argument that it violated the due process rights of the limited partners. We treat that argument below. His new constitutional claims are thus not properly presented for review by this Court. *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977).



*Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). By contrast, criminal forfeiture under RICO requires that a defendant be found guilty beyond a reasonable doubt of one of the most serious federal criminal offenses and that the jury further find, again beyond a reasonable doubt, that the property in question is so related to the RICO offense that it is subject to forfeiture under the statute. It is farfetched to claim that these procedures are constitutionally defective, particularly by comparison with those applicable to a civil *in rem* proceeding.

Petitioner's suggestion that RICO permits "forfeiture of estate" in contravention of Article III, § 3, Cl. 2 of the Constitution has been rejected by every court that has considered the issue. *E.g.*, *United States v. Grande*, 620 F.2d 1026, 1037-1039 (4th Cir.), cert. denied, 449 U.S. 830 (1980); *United States v. Huber*, 603 F.2d 387, 396 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980); *United States v. L'Hoste*, 609 F.2d 796, 813 n.15 (5th Cir.), rehearing denied, 615 F.2d 383, cert. denied, 449 U.S. 833 (1980).

The common law doctrine of forfeiture of estate or "corruption of the blood" required surrender of the defendant's estate and chattels upon conviction of treason and certain other felonies. *Calero-Toledo v. Pearson Yacht Leasing Co.*, *supra*, 416 U.S. at 682. By contrast, as the Senate Committee on the Judiciary noted in explaining Section 1963, "the concept of forfeiture as a criminal penalty [is] limited \* \* \* in Section 1963(a) to one's interest in the enterprise which is the subject of the specific offense involved here, and [does] not extend[] to any other property of the convicted offender \* \* \*." S. Rep. No. 91-617, 91st Cong., 1st Sess. 80 (1969). The Committee emphasized that the purpose of the forfeiture statute

was to divest persons engaged in criminal activities of their interests in organizations acquired or operated through racketeering methods. *Id.* at 79-80; see *Russello v. United States*, No. 82-472 (Nov. 1, 1983), slip op. 10-12. The unusually extensive forfeiture in this case is the result of petitioner's deliberate decision to use Cauble Enterprises to further the illegal scheme.<sup>8</sup>

Petitioner incorrectly suggests that certain business assets were included in the RICO enterprise merely because he owned them. The government sought and obtained forfeiture of only one thing—petitioner's interest in the partnership. Petitioner admitted at trial, on direct examination, that all of his property was a part of Cauble Enterprises (Pet. App. 43a-44a, n.100).

Petitioner also suggests (Pet. 14) that the forfeiture here was "all out of proportion to" his guilt.<sup>9</sup> In fact, the forfeiture of petitioner's interest in Cauble Enterprises is a suitable punishment for his crimes. Petitioner masterminded the largest drug smuggling operation ever uncovered in the state of Texas. As the statement of facts shows, the smuggling operation was facilitated at every step by the many human, physical, and financial assets of Cauble Enterprises. The whole purpose of the RICO statute is to prevent such business enterprises from being corrupted and used for criminal ends. Petitioner received the severe punishment mandated by Congress.<sup>10</sup>

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<sup>8</sup> Petitioner has hardly been pauperized by the forfeiture judgment. His wife and son, who are dependent upon him, remain immensely wealthy.

<sup>9</sup> No such argument was made below.

<sup>10</sup> We note that petitioner received only a five-year prison term. Other conspirators in the same smuggling operation received as much as twenty years' imprisonment.

See *United States v. Tunnell*, 667 F.2d 1182 (5th Cir. 1982); *United States v. Grande*, *supra*, 620 F.2d at 1039; see, generally, *Russello v. United States*, *supra*.

Petitioner's claim (Pet. 15) that RICO allows forfeiture only of racketeering profits is obviously incorrect. Indeed, the issue before this Court in *Russello v. United States*, *supra*, was whether racketeering profits may be forfeited. This Court held that they may be. No one has ever doubted that the defendant's interest in the racketeering enterprise itself may be forfeited, whether or not it is illegally acquired. That is all that was forfeited here.

Petitioner also argues that certain assets owned by Cauble Enterprises had no direct connection with the smuggling episodes and therefore are not subject to forfeiture. However, as the court of appeals correctly pointed out (Pet. App. 44a-45a), petitioner's argument misperceives the difference between an *in personam* RICO forfeiture based on the enterprise concept and a traditional *in rem* forfeiture aimed at the physical instrumentalities of crime. Each asset of Cauble Enterprises need not be "tainted" by use in connection with the racketeering activity. It suffices that the asset is part of the defendant's interest in the enterprise.<sup>11</sup>

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<sup>11</sup> Petitioners' reliance upon *United States v. Zang*, 703 F.2d 1186 (10th Cir. 1982), is misplaced. The question there was whether the investment of racketeering proceeds in a legitimate business, in violation of 18 U.S.C. 1962(a), permits the forfeiture of the defendant's entire interest in the business or merely the invested racketeering proceeds. The court of appeals remanded the case for the district court to determine whether "untainted interests" existed in the enterprise and to protect the "interests of innocent third parties." 703 F.2d at 1195. The court of appeals' opinion is somewhat ambiguous. But if the court meant to hold that only the invested racketeering proceeds were subject to forfeiture, that would clearly be

Petitioner makes the related argument that the jury should have been given a choice of which assets it wished to forfeit rather than a special verdict form with only two options: the forfeiture of all of petitioner's interest in the enterprise or nothing. But petitioner did not object to the all or nothing choice given the jury, and he must therefore rely upon the plain error doctrine. For the reasons stated by the court of appeals (Pet. App. 44a-45a), there was no error at all in the procedure used here. There was no factual or legal basis for the jurors to make distinctions between different assets, as petitioner suggests they should have been permitted to do. It is untenable to argue, as petitioner does, that certain assets might be found to afford a source of influence over the criminal enterprise whereas other equally valuable assets might not.

3. Petitioner next urges (Pet. 15-18) this Court to provide guidance to the lower courts on the question of what nexus must be proved between the RICO defendant, his racketeering acts and the enterprise in order to sustain a finding of guilt under Section 1962(c). While that question has received a good deal of attention by the lower courts, and the tests they have devised may not be identical, there is no reason for this Court to review the question in this

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incorrect since the defendants' original interest in the business was "maintained" with the racketeering funds. See Section 1963(a).

In any event, *Zang* merely involves a forfeiture for violation of Section 1962(a). Because petitioner's interest in Cauble Enterprises was forfeited for violations of Section 1962(c) and (d) as well as Section 1962(a), *Zang* could not aid him.

case because petitioner stands properly convicted of the Section 1962(c) charge under any test.<sup>12</sup>

Petitioner contends that the evidence at trial was insufficient to meet the nexus test established by the court of appeals here. Petitioner is wrong and, in any event, there is no need for this Court to review a challenge to the sufficiency of the evidence. The government showed that approximately \$900,000 in unexplained cash was deposited into Cauble Enterprises' Special Account at Western State Bank of Denton in 1977 and 1978, the years when the marijuana importations occurred. The evidence demonstrated that this cash was a part of petitioner's share of the proceeds from the smuggling operation. Petitioner's statement (Pet. 18) that he proved at trial that the cash deposits were derived from cattle sales and gambling is flatly contradicted by the record.<sup>13</sup>

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<sup>12</sup> Petitioner does not contend that he would fare better under any of the other tests articulated by the lower courts, which are less demanding than the one formulated by the court below in this case. See Pet. App. 8a-10a, 27a, and cases cited therein.

<sup>13</sup> Petitioner testified that \$165,000 in cash deposits represented money he won on a trip to Las Vegas. The only corroboration he offered was four cash deposit slips adding up to \$165,000 with handwritten notations that the cash was won in Las Vegas. However, the government established that the handwritten notations had been added to the deposit slips after they were subpoenaed by the grand jury (Pet. App. 23a n.55; 8 Tr. 898-901; GX 20).

Petitioner presented virtually no evidence in support of his attorneys' argument that the remainder of the cash deposits represented unrecorded cattle sales for cash. By contrast, the government presented irrefutable proof, covering several hundred pages of testimony, that there were no cash cattle sales. The deposit slips with notations indicating cash cattle

Petitioner also ignores the fact that the court of appeals held (Pet. App. 10a n.24) that "if the defendant exercised such control over the legal enterprise as to make his acts the acts of the enterprise, proof of the defendant's commission of racketeering acts satisfies both nexuses. In that event the defendant's connection with the racketeering acts is also the enterprise's connection." It was undisputed at trial that petitioner exercised total control over Cauble Enterprises and that he was actively involved in the details of its operations (8 Tr. 782-785, 798, 808, 826, 861-863, 866-868; 13 Tr. 2049-2050, 2097, 2114-2116).

4. Petitioner contends (Pet. 20) that the court of appeals erred in holding that a district court has no discretion under Section 1963(c) "to establish the terms and conditions of forfeiture and to protect the interests of innocent third parties." Petitioner has seen fit to interpret the court of appeals' holding in a diametrically opposite fashion in litigation that is continuing in the Texas district court. Petitioner, now joined by the limited partners (whom he in reality controls), contends in the district court that, according to the terms of the limited partnership agreement, the partnership may not be dissolved until the year 2002 and that the United States must therefore wait until then to obtain its 31% share of the partnership assets.<sup>14</sup> Given the rapid rate at which

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sales were simply part of petitioner's effort to obstruct the grand jury investigation. This evidence is summarized at pages 35-39 of the government's brief in the court of appeals.

<sup>14</sup> This argument was raised for the first time when the government renewed its request that the district court appoint a receiver to manage Cauble Enterprises. The district court had previously declined to appoint a receiver despite petitioner's repeated squandering of the assets of the partnership through reckless speculation in precious metals and interest rate futures and through further gambling in Las Vegas.



the partnership is losing money due to petitioner's mismanagement, it is almost certain that there would be nothing left to divide by that time.

Petitioner also omits mention of the fact that the attorney representing the limited partners is at present engaged in negotiating an agreement with the government that would allow the limited partners gradually to buy out the government's interest in the partnership. That is the practical solution preferred by the limited partners. This explains why the limited partners have not filed a petition for remission or mitigation of the forfeiture with the Attorney General.<sup>15</sup> The government, exercising its statutory responsibility to make "due provision for the rights of innocent persons" (Section 1963(c)), is already making every effort to protect the legitimate interests of the limited partners.

Petitioner's suggestion that the limited partners' due process rights were denied because they did not receive notice of the impending forfeiture is incorrect. The limited partners (petitioner's wife and son) were fully aware of this highly publicized criminal proceeding from the outset.<sup>16</sup> They did not obtain

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<sup>15</sup> Because the limited partners have not filed a petition for remission or mitigation, petitioner's suggestion (Pet. 20) that it is time for this Court to examine the "procedural fairness of this suggested procedure" is clearly premature. In any event, the limited partners have not sought review here, and petitioner has no standing to represent their interests, which are quite different from his.

The change in Department of Justice policy noted by petitioner (Pet. 19 and n.19) does not preclude the limited partners from filing a petition for remission or mitigation because their legal interests in the partnership are not co-extensive with the order of forfeiture.

<sup>16</sup> In any event, third parties who may be affected by a judgment of forfeiture are simply not entitled to notice or a hearing prior to the time that the judgment is entered.

counsel or enter an appearance prior to the entry of the judgment of forfeiture or for many months thereafter. Petitioner purported to represent the interests of the limited partners in the courts below and purports to represent their interest here. Petitioner may not have it both ways. If he does represent the limited partners' interests, then they have had their "day in court." If he does not represent their interests, then he has no standing to challenge the forfeiture judgment now on their behalf.

Petitioner also maintains (Pet. 20-21) that the court of appeals' decision is in conflict with this Court's holding in *United States v. Rodgers*, No. 81-1476 (May 31, 1983). *Rodgers* was a tax case in which the issue was whether 26 U.S.C. 7403 empowers a federal district court to order the sale of a family home in which a delinquent taxpayer had an interest at the time he incurred his indebtedness, but in which the taxpayer's spouse, who does not owe any of that indebtedness, also has a separate "homestead" right as defined by Texas law. This Court held that the statute does grant power to order the sale, but that its exercise is limited to some degree by equitable discretion. *United States v. Rodgers*, *supra*, slip op. 1. This Court therefore reversed the decision of the court of appeals, which had held that "the federal tax lien may not be foreclosed against the homestead property for as long as the nontaxpayer spouse maintains his or her homestead interest under state law." *United States v. Rodgers*, 649 F.2d 1117, 1125 (5th Cir. 1981).

In his briefs in the Fifth Circuit, petitioner made no mention of that court's decision in *Rodgers* even though that decision might have lent some colorable support to his argument that, under Texas partnership law, the United States could not take his place

as a partner in Cauble Enterprises. Brief for Appellant Rex C. Cauble at 43-45. Following the affirmation of petitioner's conviction and the judgment of forfeiture, and the issuance of this Court's decision in *Rodgers* reversing the Fifth Circuit (both of which occurred on May 31, 1983), petitioner sought rehearing in the Fifth Circuit. At that time, he argued that the court of appeals' decision in this case was in conflict with this Court's decision in *Rodgers*. The same court of appeals that had decided *Rodgers* adversely to the government denied the rehearing petition without a dissenting vote. There is no reason for this Court to review the issue inasmuch as it was not presented at the proper time in the court of appeals and the court below did not pass upon it. Moreover, as we have already noted, the limited partners and the government are attempting to reach an out-of-court settlement that would protect everyone's legitimate interests in Cauble Enterprises. And the limited partners have not sought review of the decision below.

In any event, petitioner's allegation of a conflict is groundless. It is obvious that the decision in *Rodgers*, which is concerned with the proper application of 26 U.S.C. 7403, has nothing to say about the correct interpretation of 18 U.S.C. 1963, the RICO forfeiture provision. This Court's holding in *Rodgers* that a district court possesses some discretion under 26 U.S.C. 7403 to balance the equities involved in a particular case was based on the fact that Section 7403 provides that a district court "may" decree the sale of property. The Court observed that, under settled principles of statutory construction, the use of the word "may" usually implies some degree of discretion absent indications of contrary legislative intent, which it did not find to be present.

The forfeiture provisions of the RICO statute, by contrast, use the word "shall," and the courts of appeals have consistently held that Congress intended forfeitures under RICO to be mandatory. *United States v. L'Hoste*, 609 F.2d 796 (5th Cir.), cert. denied, 449 U.S. 833 (1980); *United States v. Godoy*, 678 F.2d 84 (9th Cir. 1982); *United States v. Hess*, 691 F.2d 188, 190-191 (4th Cir. 1982). Thus, this Court's construction of Section 7403 would clearly not control its construction of Section 1963.

5. Petitioner's final contention (Pet. 21-22) is that the court of appeals erred in upholding his conviction on the four bank misapplication counts despite its statement that *United States v. Britton*, 108 U.S. 193, 197 (1883), "may be construed as recognizing a consent defense." The Court need not consider this contention because, even if petitioner's conviction on these four counts were vacated, neither the length of time he will spend in prison nor the scope of the forfeiture judgment would be affected. See *Andresen v. Maryland*, 427 U.S. 463, 469 n.4 (1976); *Barnes v. United States*, 412 U.S. 837, 848 n.16 (1973).

In any event, petitioner's claim that the decision below conflicts with *Britton* is without merit. The facts in *Britton* are totally different from those here. *Britton* recognized (108 U.S. at 197) that, in a situation where the discounting of an insolvent bank officer's note was within the discretion of the board of directors of the bank and the board, "knowing the facts, order[ed] it to be discounted, it would approach the verge of absurdity to say that the use by the officer of the proceeds of the discount for his own purposes, would be a wilful misapplication of the funds of the bank, and subject him to a criminal prosecution."

Here, only two of the four loans that formed the basis for the four misapplication counts were "approved" by the banks in any manner. See Pet. App. 51a-52a. Thus, petitioner's argument concerns only two of the four misapplication counts. Even with respect to those two counts, the facts here are readily distinguishable from *Britton* because 1) the banks clearly had no discretion to loan money for the purpose of aiding a marijuana smuggling operation; 2) petitioner did not inform the banks of the true purpose for which the loans were made; and 3) petitioner's control over the banks in question was so great as to preclude their board of directors or loan committee from questioning petitioner's actions. See Pet. 54a n.125.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1983

JAN 16 1984

ALEXANDER L. STEVANS.

No. 83-585

IN THE  
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OCTOBER TERM, 1983

REX C. CAUBLE, Individually and  
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UNITED STATES OF AMERICA.

**REPLY TO OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI TO THE  
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FOR THE FIFTH CIRCUIT**

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**I. INTRODUCTION**

We file this reply brief to address an argument not anticipated in our petition and to bring to the Court's attention a series of extraneous and undocumented assertions and several serious misstatements of the record relied on in the Brief for the United States in Opposition. (Hereinafter "Government Brief").

**II. THE GOVERNMENT HAS MADE ASSERTIONS  
BEYOND THE RECORD TO SUPPORT ITS POSITION.**

The government attempts to rebut the serious due process issue raised at Point III of our petition for certiorari by arguing that it has taken all necessary steps to

protect the interests of innocent third parties in the forfeiture proceeding. The government first, without benefit of any record evidence, attempts to portray the limited partners as mere pawns who are under the control of Mr. Cauble and dependent upon him. Government Brief, p. 9 n.10; p. 13. It then goes on to cast Mr. Cauble's continuing stewardship of Cauble Enterprises as mismanagement marked by his squandering of assets. Government Brief, pp. 13-14.

The government recently made these allegations before the district court and asked that Cauble Enterprises be placed in receivership. The court rejected these ill-founded assertions and refused to appoint a receiver. While it is clearly improper to introduce information before this Court not contained in the record the government has gone farther and chosen to state as facts those very premises which were dismissed by the court below.

The government has also chosen to disclose settlement discussions which it has recently conducted with the limited partners, well after the close of the record in this case. Government Brief, p. 14. This is not only a violation of the spirit of Federal Rule of Evidence 408 but fails to provide any basis for judging the accuracy of its representations regarding the course of these negotiations.

The serious due process issue raised by the forfeiture in this case cannot be resolved on the basis of the government's assurances that it will protect the rights of the limited partners and reliance on unresolved matters not part of this record.

The government argues at p. 14 n.15 of its brief that the change in Department of Justice policy noted in our petition at p. 19 n.19 does not preclude the limited partners

from filing a petition for remission or mitigation of forfeiture. The record statement of the Deputy Assistant Attorney General quoted at p. 19 of the petition indicates that Department policy is precisely to the contrary. The record testimony of Department of Justice policy is that when legal interests are not coextensive with the order of forfeiture, as here, then third parties are entitled to judicial resolution of their claims and need not rely on the remission and mitigation process.

The government cannot avoid the facts of record that the third parties in this case are in fact innocent, have no available extrajudicial remedies and in accordance with the court of appeals' opinion have no rights to seek a vindication of their interest before the district court.

### III. THE BRIEF IN OPPOSITION CONTAINS SERIOUS FACTUAL MISSTATEMENTS.

While we will not dwell on disputes of fact, the Government's Brief contains several significant misstatements of the record which we feel obliged to correct. The government's brief is littered with citations to the trial record which bear little or no relationship to the factual propositions for which they are cited. For example, several record excerpts ostensibly support the proposition that "several employees of Cauble Enterprises were arrested" on a marijuana smuggling boat. Government's Brief, p. 3. A review of these transcript references and the trial record in its entirety indicates that only one *former* employee of Cauble Enterprises was arrested on the boat. *See* Tr. 2121, 2122. This single employee was referred to as having worked for a Cauble Enterprises' subsidiary "before he became a drug smuggler." Tr. 1097.

Similarly, the Government's Brief contains the startling statement that Mr. Cauble, after receiving a grand

jury subpoena, directed Cauble Enterprises' bookkeeper to falsify bank deposit slips. Government Brief pp. 5, 12 n.13. A review of the transcript pages cited by the government demonstrates that, as the court of appeals found, Petition App. 23a n.55, there was evidence that notations had been entered on deposit slips after the originals were filed with the bank. There is no record evidence, however, of these changes being accomplished after the government subpoenas were issued. The bookkeeper testified that the notations were entered on the deposit slips as a matter of normal business routine to provide an accounting record of the nature of the deposits after they were made. Tr. 879-880.

We will not seek to correct other factual misstatements in the government's Opposition Brief but merely point these out to demonstrate the frailty of the government's argument in opposition.

Respectfully submitted,

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